Petition

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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

BMW OF NORTH AMERICA, INC.

and

BAYERISCHE MOTOREN WERKE A.G.
Petitioners

VS.

DANIEL G. GROVE, Executor of the Estate of STUART STILLER

and

HEISHMAN BMW, INC.

and

LOHR & BROMKAMP GmbH
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED FOR REVIEW

1. Whether every transfer order entered by the United States District Court for the District of Columbia is subject to an interlocutory review by the United States Court of Appeals for the District of Columbia Circuit via a petition for a writ of mandamus because every such transfer order, by definition of the District of Columbia Circuit, involves a transfer to a district court beyond the appellate jurisdiction of the United States Court of Appeals for the District of Columbia Circuit.

2. Whether the United States Court of Appeals for the District of Columbia Circuit erred in refusing to follow the clear holding of this Court in *Bankers Life and Casualty Company* v. *Holland*, 346 U.S. 379 (1953) that mandamus is not an appropriate remedy to vacate a transfer order entered by a district court judge on the ground of improper venue under 28 U.S.C. § 1406(a).

3. Whether the United States Court of Appeals for the District of Columbia Circuit erred in refusing to follow the Federal Rules of Appellate Procedure and its own local rules by granting a petition for a writ of mandamus by a two judge panel without notice to the parties that it would do so without oral argument and by ruling on an issue not before the court, and hence, not briefed by the respondents therein.

PARTIES BELOW

The respondents in the mandamus proceeding in the United States Court of Appeals for the District of Columbia Circuit, *In re: Daniel G. Grove, Executor of the Estate of Stuart Stiller,* No. 81-1482, were BMW of North America, Inc., Bayerische Motoren Werke A.G., Heishman BMW, Inc., Lohr & Bromkamp GmbH and the Honorable June L. Green, Judge, United States District Court for the District of Columbia. Respondent Grove is the plaintiff in the district court proceedings and was the petitioner in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, BMW of North America, Inc., and Bayerische Motoren Werke A.G., respectfully pray that a writ of certiorari issue to review the issuance of a writ of mandamus by the United States Court

of Appeals for the District of Columbia Circuit on July 2, 1981, (rehearing *en banc* denied August 5, 1981), and that the Order issuing the writ of mandamus be reversed.

OPINIONS BELOW

The Honorable June L. Green, Judge of the United States District Court for the District of Columbia, issued an unreported memorandum opinion and order on February 27, 1981, in which this action was transferred to the United States District Court for the District of Maryland, pursuant to 28 U.S.C. § 1406(a) on the ground of improper venue under 28 U.S.C. § 1391 (c) (App. E). The United States Court of Appeals for the District of Columbia Circuit, upon petition by Respondent Grove, then issued a writ of mandamus in an unreported *per curiam* order and opinion dated July 2, 1981 which vacated the transfer order and remanded the case for further proceedings (App. A). A motion to set aside the order issuing the writ of mandamus and a petition for rehearing was denied *per curiam* without opinion by the Court of Appeals on August 5, 1981 (App. B). Also, on August 5, 1981, the United States Court of Appeals for the District of Columbia Circuit, *en banc,* denied, *per curiam* without opinion, a suggestion for rehearing *en banc.* (App. C).

JURISDICTIONAL STATEMENT

Jurisdiction to review these Orders of the Court of Appeals dated July 2 and August 5, 1981, by Writ of Certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case involves the following statutory provisions which are set forth in Appendix K:

28 U.S.C. § 41
28 U.S.C. § 1254(1)
28 U.S.C. § 1291
28 U.S.C. § 1292(b)
28 U.S.C. § 1391(c)
28 U.S.C. § 1404(a)
28 U.S.C. § 1406(a)
28 U.S.C. § 1651(a)
13 D.C. Code Ann. § 423 (1981 ed.)

STATEMENT OF THE CASE

On April 22, 1980, Respondent Daniel Grove, a resident of the State of Maryland, commenced the underlying survival and wrongful death action as the Executor of the Estate of Stuart Stiller who died on August 4, 1979, in the State of Maryland, as a result of injuries sustained in Maryland in a one car automobile accident (App. M). The accident occurred on August 4, 1979, as Stuart Stiller was driving a 1978 BMW 530i automobile which allegedly went out of control and struck a tree as he was travelling northward on Maryland State Route 355 (App. T at 76a). Mr. Stiller was taken by members of a Maryland Rescue Squad to a Maryland hospital (App. T at 78a) where he received treatment by Maryland physicians. The accident was investigated by the police department of Montgomery County, Maryland (App. T at 79a). The automobile was towed from the scene by a Maryland towing company to Bethesda, Maryland (App. T at 79a) where it remained until August 6, 1979, when it was towed to the Montgomery County Police Department Substa-

tion located in Rockville, Maryland for examination by the Montgomery County Police Department (App. T at 79a). On September 10, 1979, the car was towed to Dehn's Auto Repair in Rockville, Maryland, allegedly for the purpose of storage (App. T at 79a).

The sole eyewitness to the accident was Barbara Butler, who resides in Daytona Beach, Florida (App. T at 77a). The plaintiff's tentative experts are residents of the States of Michigan and Maryland[1] (App. T at 78a). These Petitioners' witnesses are all residents of jurisdictions other than the District of Columbia.[2]

This underlying action was brought in the United States District Court for the District of Columbia against Heishman BMW, Inc.,[3] BMW of North America, Inc.[4] (hereinafter referred to as BMWNA), Bay-

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[1] Robert Brenner's address is 6400 Goldsboro Road, Bethesda, Maryland, 20034, erroneously listed as being in Washington, D.C. by plaintiffs.

[2] These facts are recited herein so that this Court will fully appreciate the jurisdictional foundations and the venue considerations of this case as they relate to the discussion of the propriety of transfer, *infra*.

[3] Heishman is a closed corporation incorporated under the laws of the State of Virginia. Heishman sold the BMW vehicle which Stuart Stiller was operating at the time of his demise to the Maryland National Bank (not a party herein) which in turn leased the vehicle to Stiller, Adler and Schwartz, P.C., the law firm with which Mr. Stiller was associated (App. T at 77a). Heishman does business in Virginia, Maryland and the District of Columbia.

[4] BMWNA is a corporation incorporated under the laws of the State of Delaware, with its principal place of business located in Montvale, New Jersey. BMWNA is the North American distributor of BMW automobiles which sold the subject vehicle to Heishman. BMWNA conducts no business in the District of Columbia and is a wholly owned subsidiary of BMWAG (App. O).

erische Motoren Werke A.G.[5] (hereinafter referred to as BMWAG), and Lohr & Bromkamp GmbH [6] (hereinafter referred to as Lohr), on various theories of alleged negligence in repair, maintenance, assembly, manufacture and design of the automobile Stuart Stiller was driving at the time of the accident (App. M). The basis for jurisdiction in the district court is allegedly founded upon 28 U.S.C. § 1332 and 13 D.C. Code Ann. § 423 (1981 ed.), (App. E).

Subsequently, BMWNA, BMWAG and Lohr timely moved to dismiss this action or to transfer it to the United States District Court for the District of Maryland on the grounds of lack of jurisdiction and improper venue (App. N, P). These motions were initially denied by the trial court. (App. I, J). These Petitioners and Lohr, after seeking reconsideration of the aforementioned denials of their motions to dismiss or transfer, (App. H), then sought, pursuant to 28 U.S.C. § 1292(b), certification of the orders denying the said motions. At a status call the district court treated these motions to certify as motions to reconsider its previous

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[5] BMWAG is the manufacturer of BMW automobiles and is organized under the law of the Federal Republic of Germany, having its principal place of business in Munich, Federal Republic of Germany. BMWAG does no business in the District of Columbia (App. Q).

[6] Lohr is also organized under the laws of the Federal Republic of Germany. Its principal place of business is in Offenbach am Mein, Federal Republic of Germany. Lohr designs, manufactures and assembles component automobile parts, and is the manufacturer and seller of the constant velocity joint which Respondent Grove alleges was defective, and caused the automobile which Stuart Stiller was driving to go out of control. Lohr conducts no business in the United States (App. R).

ruling (App. U at 86-87a). As a result of this reconsideration, the district court on February 27, 1981, issued a memorandum opinion which denied the motions to certify (App. F) and held that venue was improper in the District of Columbia as none of the moving defendants were doing business in the District of Columbia and that this case should therefore be transferred to the United States District Court for the District of Maryland (App. E at 9a) where venue was proper (App. U).

Respondent Grove immediately sought reconsideration of the memorandum opinion (App. L at 25a) and thereafter moved for certification under 28 U.S.C. § 1292(b) (App. L at 25a). When these motions were denied by the district court, Respondent Grove petitioned the United States Court of Appeals for the District of Columbia Circuit for a writ of mandamus, primarily to compel Judge Green to vacate her transfer order. On May 27, 1981, the Court of Appeals ordered these Petitioners to respond to the aforesaid petition for a writ of mandamus (App. D) in accordance with F.R. App. P. 21(b). Petitioners BMWAG and BMWNA timely responded to the petition for a writ of mandamus on June 16, 1981, and Lohr responded on June 17, 1981. The issuance of a writ of mandamus by the Court of Appeals came on July 2, 1981 (App. A) without notice to the parties of the dates on which briefs were to be filed or of a date for oral argument. These Petitioners on July 16, 1981, then jointly with Lohr, moved to set aside the order issuing the writ of mandamus and petitioned the Court of Appeals for a rehearing *en banc*. Both the motion and the petition were denied *per curiam* on August 5, 1981 (App. B, C). This Petition for a Writ of Certiorari followed.

ARGUMENT

I. Review by This Court Is of Imperative Public Importance and Is Necessary To Prevent the Usurpation of Judicial Power by the United States Court of Appeals for the District of Columbia Circuit and To Define the Proper Scope of Mandamus Within the District of Columbia Circuit.

A writ of certiorari must issue in this case to prevent the patent injustice which these Petitioners will suffer as a result of the impermissibly broad expansion of the scope of mandamus by the United States Court of Appeals for the District of Columbia Circuit. In issuing a writ of mandamus herein, the Court of Appeals has ignored the explicit holdings of this Court and espoused the view that a writ of mandamus is available to review every transfer order entered by the United States District Court for the District of Columbia. Such an interpretation of the All Writs Act[1] allows the United States Court of Appeals for the District of Columbia Circuit to exercise supervisory power over its district court unparalleled by the power of any other court in the United States. The procedure utilized by the Court of Appeals transforms an extraordinary remedy into one which sanctions piecemeal appeals prior to final judgment and deprives the district court of its authority to decide questions of law. The unsupportable action of the Court of Appeals evidences the need for this Court to invoke its supervisory powers over the United States Court of Appeals for the District of Columbia Circuit so that interlocutory decisions in the United States District Court for the District of Columbia will not be under constant and continuous review by that appellate court.

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[1] 28 U.S.C. § 1651.

A. A Writ of Mandamus is an Inappropriate Remedy to Vacate a Transfer Order Entered Pursuant to 28 U.S.C. § 1406(a).

The issue affirmatively decided by the United States Court of Appeals for the District of Columbia Circuit was that a writ of mandamus is an appropriate remedy to vacate a transfer order of its district court under 28 U.S.C. § 1406(a) (App. A). However, this Court in *Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379 (1953), decided the very issue before the Court of Appeals when this Court held that mandamus is not an appropriate remedy to vacate a severance and transfer order entered by a district court judge on the ground of improper venue under 28 U.S.C. § 1406 (a).[8] In fact, no opinion of this Court subsequent to *Bankers Life* has allowed a court of appeals through a writ of mandamus to vacate a transfer order of a district court under 28 U.S.C. § 1406(a). The total lack of authority for the actions of the Court of Appeals and the flagrant refusal to follow the clear holding of *Bankers Life* underscores the need for this Court to reverse the Order of the United States Court of Appeals for the District of Columbia Circuit.

In granting mandamus, the Court of Appeals apparently ignored this Court's lengthy discussion in *Bankers Life* on the unavailability of mandamus in cases precisely like the case at bar. In *Bankers Life*, this

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[8] In *Bankers Life*, the district court had first determined that it had jurisdiction of the cause under 28 U.S.C. § 1391. The district court in *Bankers Life* then decided that venue was improper and, under the identical statute invoked herein, transferred the case to another district. A writ of mandamus directed to the trial judge was then sought by the Petitioner, Bankers Life and Casualty Co., to vacate the transfer order and this Court subsequently affirmed the denial of the petition for a writ of mandamus by the Court of Appeals.

Court, in language particularly instructive here, stated:

> . . . the 'traditional use of the writ of mandamus in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Here, however, petitioner admits that the court had jurisdiction both of the subject matter of the suit and of the person of Commissioner Cravey and that it was necessary in the due course of the litigation for the respondent judge to rule on the motion. The contention is that in acting on the motion and ordering transfer he exceeded his legal powers and the error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. The ruling on a question of law decisive of the issue presented by Cravey's motion and the replication of the petitioner was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 45-46 (1913); *Ex parte Roe*, 234 U.S. 70, 73 (1914). Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power, *Roche* v. *Evaporated Milk Ass'n.* [319 U.S. 21 (1943)], and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. (Footnote Omitted) 346 U.S. at 382-383.

It is therefore submitted, based upon the reasoning above, that *Bankers Life and Casualty Co.* v. *Holland* is indistinguishable from the present case and that mandamus under the circumstances of this action was inappropriate.

Judge Green, much like the district court judge in *Bankers Life,* first determined that jurisdiction over these defendants was conferred on her court pursuant to 28 U.S.C. § 1332 and D. C. Code Ann. § 13-423 (a) (1)[9] (1981 ed.) (App. E at 7a). Similarly, the district court herein then found that venus was improper under 28 U.S.C. § 1391 and transferred this case under 28 U.S.C. § 1406(a)[10] (App. E at 8a). After reviewing the facts, the decision to transfer was, as in *Bankers Life,* a ruling on a question of law which was made during the course of the exercise of the district court's jurisdiction, *Ex parte American Steel Barrel Co.,* 230 U.S. 35 (1913), *Ex parte Roe,* 234 U.S. 70 (1914), and is reviewable upon direct appeal after final judgment, *Bankers Life, supra;* thus, mandamus was unnecessary.

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[9] These Petitioners have vigorously contested this *in personam* jurisdiction of the district court under D.C. Code Ann. § 13-423(a) (1) (1981 ed.) since the outset of this case and have recently filed a joint motion for reconsideration of the district court's jurisdictional findings based upon this Court's holding in *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980), and the District of Columbia Court of Appeals' recent decision in *Mouzavires* v. *Baxter, slip op.* No. 11696 (D.C. App., August 5, 1981). In any event, a finding by the transferor court that it has jurisdiction of an action is unnecessary and irrelevant to a decision to transfer the case to another district on the basis of improper venue. *See, Goldlawr* v. *Heiman,* 369 U.S. 463 (1962).

[10] Under 28 U.S.C. § 1406(a), the district court of a district in which venue is laid in the wrong district is required to either dismiss the action or to transfer it to any district in which it could have been brought (App. K at 18a).

B. *A Writ of Mandamus is an Inappropriate Remedy to Review Every Transfer Order of the United States District Court for the District of Columbia*

1. ***Resort to Mandamus is authorized only in extraordinary circumstances.***

The first requirement for the invocation of one of "the most potent weapons in the judicial arsenal," *Will* v. *United States*, 389 U.S. 90 (1967), is that the petitioner show that his right to the issuance of the writ is "clear and indisputable." *Id.* at 96. A classic example of the proper use of the extraordinary writ to protect appellate jurisdiction appeared in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), wherein the action had been remanded to a state court on grounds completely unauthorized by statute. As this Court has said, the proper use of mandamus arises only in exceptional and extraordinary circumstances to confine a lower court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a duty to do so, *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21 (1943), *Kerr* v. *United States District Court*, 426 U.S. 394 (1976), *Bankers Life and Casualty Co.* v. *Holland*, *supra*, and only those circumstances amounting to a judicial usurpation of power will justify the invocation of this drastic remedy. *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945). Mandamus, as an extraordinary remedy, is reserved for "really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 260 (1947).

In issuing a writ of mandamus to vacate the order of the United States District Court for the District of Columbia transferring this action to the United States District Court for the District of Maryland, the Court

of Appeals relied upon the incorrect rationale that "the district court's finding of improper venue in the District of Columbia would evade review absent the remedy of mandamus." (App. A). However, this statement is in error as the finding of improper venue by the district court would be reviewable upon direct appeal to the United States Court of Appeals for the Fourth Circuit once a final judgment is rendered. 28 U.S.C. § 41; 28 U.S.C. § 1291; *Bankers Life and Casualty Co.* v. *Holland, supra* at 382. What the Court of Appeals must have intended, therefore, is that the venue ruling would not be subject to its own review absent the remedy of mandamus. However, the Court of Appeals did not explain why the United States Court of Appeals for the Fourth Circuit is not equally as competent to decide a question of federal law as is the United States Court of Appeals for the District of Columbia Circuit. Nor did the Court of Appeals explain how this transfer order was distinguishable from any other transfer order entered by its district court or any transfer of litigation between district courts of different circuits, thus justifying resort to the extraordinary writ.

The Court of Appeals was similarly in error when it attempted to distinguish the holding in *Bankers Life*[11] by stating:

> A writ of mandamus is the appropriate remedy in this case to vacate the transfer order of the district court. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953) is not dispositive. In that case, "whatever 'judicial inconvence [sic] and hardship' [existed would] remain, after transfer,

[11] *Bankers Life* was the only case cited in the Court of Appeals pertaining to mandamus.

> within the realm of the same court of appeals, which had denied the writ, since both of the districts were within that circuit . . . (App. A).

Under the above interpretation by the Court of Appeals, whenever a transfer is ordered between circuits, mandamus is available to the parties to cause the transferor court of appeals to review the correctness of the ruling of its district court and to avoid "judicial inconvenience and hardship." This interpretation, however, is based upon a partial quotation from *Bankers Life* which seemingly is supportive of the Court of Appeals' view of "judicial inconvenience and hardship." An analysis of the full statement of this Court, however, reveals that a wholly different interpretation is to be given to the concept of judicial inconvenience and hardship:

> It is urged, however, that the use of the writ of mandamus is appropriate here to prevent 'judicial inconvenience and hardship' occasioned by appeal being delayed until after final judgment. But it is established that the extraordinary writs cannot be used as substitutes for appeals . . . even though hardship may result from delay and perhaps unnecessary trial . . . and whatever may be done without the writ may not be done with it. . . . We may assume that, as petitioner contends, the order of transfer defeats the objective of trying related issues in a single action and will give rise to a myriad of legal and practical problems as well as inconvenience to both courts; but Congress must have contemplated those conditions in providing that only final judgments are reviewable. Petitioner has alleged no special circumstances such as were present in the cases which it cites. Furthermore, whatever 'judicial inconvenience and hardship' may exist here will remain after transfer, within the realm of the same court of appeals

> which has denied the writ, since both of the districts are within that circuit; and it is not clear that adequate remedy cannot be afforded petitioner in due course by that court to prevent some of the conflicts and procedural problems anticipated. (citations and footnotes omitted) 346 U.S. at 383-4.[12]

The United States Court of Appeals for the District of Columbia Circuit illogically assumes that a corollary to the statement quoted in its Order is that if a transfer involves a district court in a different circuit the writ of mandamus lies because the same court of appeals which has denied the writ will lose appellate jurisdiction. However, when there is simply a transfer between district courts of different circuits (without a severance) there is no judicial inconvenience or hardship existing after transfer within the transferor circuit. The transferee circuit assumes the hardship in-

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[12] In *Bankers Life* the United States District Court for the Northern District of Florida was presented with a motion to dismiss by one of seven defendants. The moving defendant was severed from the Florida action and his case was transferred to the Northern District of Georgia where he resided. Both of the district courts in *Bankers Life* sat in the same circuit. This Court simply utilized that fact to rebut the petitioner's argument that the severance and transfer would result in "insurmountable procedural difficulties requiring appeals from, and reversals of, the final judgments in both the Florida action and the severed action in Georgia . . ." 346 U.S. at 381. The opinion in *Bankers Life* thus implies, at most, that had the severed action been transferred to a different circuit, the petitioner may have suffered "judicial inconvenience", e.g., the possibility of two appellate courts considering appeals from the two related cases which were severed only for venue convenience. This Court's comment that the hardship will remain within the realm of the same court of appeals has no other logical implication.

herent in the transfer, if any, and any errors committed by either of the district courts will be reviewable by the court of appeals of the transferee circuit upon appeal after final judgment consistent with the contemplation of Congress and this Court as identified in *Bankers Life.*

Furthermore, the fallacy in the rationale of the Court of Appeals in authorizing mandamus as a means of reviewing transfer orders is readily apparent on other grounds. By the very definition of the District of Columbia Circuit every transfer order entered by the United States District Court for the District of Columbia involves a transfer to a district court beyond the appellate jurisdiction of the United States Court of Appeals for the District of Columbia Circuit, since that circuit contains only one district court. 28 U.S.C. § 41; 28 U.S.C. § 1291. Thus, under the Court of Appeals' rationale for granting mandamus here, transfers for want of jurisdiction or improper venue entered pursuant to, for example, 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406(a) will be potential candidates for pre-judgment review because the basis for the transfer will not otherwise be reviewable by the United States Court of Appeals for the District of Columbia Circuit. This view of the scope of the power of the Court of Appeals to issue writs of mandamus increases the appellate power of the Court of Appeals while simultaneously reducing the power of its district court to decide questions of law. This view also creates an uncertainty in the District of Columbia Circuit as to when mandamus is warranted[13] and it overlooks the

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[13] Compare the Order of the Court of Appeals in this case with that Court's opinion on the proper scope of mandamus in *National Right to Work Legal Defense Fund* v. *Richey*, 167 U.S. App. D.C.

comity of the circuits in the United States Court of Appeals. It further conflicts with the point that the Congress of the United States, in providing for review of only final judgments, must have contemplated that some judicial inconvenience and hardship results in transfers between circuits. Lastly, this view ignores the extraordinary nature of mandamus, and encourages a policy of piecemeal appeals prior to final judgment.

The implications of the decision of the Court of Appeals for future litigation also go beyond the holding in this case because venue under 28 U.S.C. § 1391(c) is not the only venue provision potentially subject to transfer; the Judicial Code provides many venue sections (which include, but are not limited to, those contained in the Clayton Antitrust Act, 15 U.S.C. § 15; the Patents and Copyrights Act, 28 U.S.C. § 1400; and the Securities and Exchange Act of 1934, 15 U.S.C. § 78aa). In the calendar year 1980 there were one hundred eighteen (118) transfer orders entered by the United States District Court for the District of Columbia in civil cases.[14] Through the end of August, 1981, there were ninety five (95) such transfer orders.[15] Since each of these transfers by definition involves a

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18, 510 F.2d 1239, *cert. denied*, 422 U.S. 1008 (1975), wherein the Court of Appeals stated "the writ of mandamus is not to be used when the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." 167 U.S. App. D.C. at 24.

[14] These figures appear in the In-House Report of the United States District Court for the District of Columbia on the Civil Case Filings and Terminations for the Calendar Years 1980 and 1981. These figures in turn become part of the Annual Report of the Director of the Administrative Office of the United States Courts.

[15] *Ibid.*

transfer to a circuit other than the District of Columbia Circuit, under the rationale of the Court of Appeals in this case, approximately one hundred cases each year are potentially subject to an early review by a petition for a writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit. Thus, the allowance of the writ of mandamus by the Court of Appeals herein evidences that appellate court's willingness to transform "... the ordinary run-of-the-mill type of litigation which goes through the District Courts from day to day," *Torres* v. *Walsh*, 221 F.2d 319, 322 (2d Cir.), *cert. denied*, 350 U.S. 836 (1955), into an exceptional, extraordinary case for which mandamus is appropriate.

2. *Resort to Mandamus to vacate a transfer order encourages piecemeal appeals.*

A major difficulty with the holding of the Court of Appeals in the instant action is that it encourages a procedure of pre-judgment appeals. This Court has repeatedly stressed the importance of the proscription against piecemeal appeals even where there has been a simple error which would justify reversal on direct appeal. *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), *Will* v. *United States, supra.*

The opinion of the Court of Appeals demonstrates an assumption of power by that court heretofore unrecognized by any opinion of this Court. The Court of Appeals is now apparently willing to review the correctness of each transfer order via mandamus before the record escapes its appellate jurisdiction.[16] This

[16] The proper remedy for relief from an allegedly incorrect venue ruling is to either seek certification of the ruling under 28 U.S.C. § 1292(b) or to directly appeal the final judgment rendered in the case. Congress in enacting 28 U.S.C. § 1292(b) provided one circumstance in which a pre-judgment appeal could be entertained and

view of mandamus jurisdiction flies in the face of the decisions of this Court and particularly the language of *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21 (1943) where, in reversing the court of appeals, this Court stated:

> In the present case, the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power. In issuing the writ, the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress, which has restricted that court's appellate review to final judgments of the district court. 319 U.S. at 32.

It cannot be argued that the district court herein acted beyond its jurisdiction in ruling that the venue was improper in the District of Columbia as *Bankers Life* disposes of such a contention and under *Roche* and *Bankers Life* the Court of Appeals should not even have reviewed the lower court's venue decision. Thus, the Court of Appeals has unlawfully sanctioned the premature review of venue rulings by the use of mandamus. The Court of Appeals in this case apparently felt that Judge Green applied the incorrect test in ordering a transfer and therefore mandamus was appropriate to correct that error" (App. A). However, Judge Green's memorandum opinion shows that she

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expressed its intent to limit other appellate review to appeals from final judgments. Since certification under § 1292(b) was denied here (App. G) review of the district court's venue ruling should therefore await the final judgment in this case.

[17] The Court of Appeals refused to allow these Petitioners to brief this issue in that Court. A separate discussion of the prejudice these Petitioners have suffered thereby appears in Part II, *infra*.

ably followed the holdings of other courts which have addressed the question of whether the conduct of the particular defendants met the criteria of "doing business" within the meaning of 28 U.S.C. § 1391(c). In fact, one of the authorities relied upon by the district court in the memorandum opinion, *Mosley* v. *Nationwide Purchasing, Inc.*, 485 F.2d 418 (Temp. Em. Ct. App. D.C. 1973) was a District of Columbia authority for the very proposition which Judge Green invoked. The opinion of the Court of Appeals in granting mandamus, however, shows that that Court was forced to look to a decision outside the District of Columbia Circuit to vacate Judge Green's order." Since the question of whether venue was improper in the District of Columbia became a question of law after a factual determination, Judge Green acted within her jurisdiction and discretion in ruling upon it, and mandamus therefore cannot be used to alter that decision. *Bankers Life and Casualty Co.* v. *Holland, supra.*

The fact that transfers under 28 U.S.C. § 1406(a) involve a question of law distinguishes those decisions to transfer or dismiss under 28 U.S.C. § 1404(a). As this Court stated in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964):

> Although both sections were broadly designed to allow transfer instead of dismissal, § 1406(a) provides for transfers from forums in which venue

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[16] Whether the "doing business" test under 28 U.S.C. § 1391(c) is identical to the jurisdictional standards first set forth in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), is an open question in the District of Columbia because the case cited by the Court of Appeals, *McKenna* v. *Udall*, 135 U.S. App. D.C. 335, 418 F.2d 1171 (1969), does not support this notion and in fact expresses no clear view at all on the subject.

> is wrongly or improperly laid, whereas, in contrast, § 1404(a) operates on the premise that the plaintiff has properly exercised his venue privilege . . . [and] despite the propriety of the plaintiff's venue selection, the chosen forum was an inconvenient one. (footnotes omitted) 376 U.S. at 634.

Furthermore, unlike § 1406(a), transfers under § 1404 (a) involve, *inter alia,* factual considerations of convenience to parties and witnesses. *See Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947) and *Hoffman* v. *Blaski,* 363 U.S. 335 (1960). Therefore, unlike cases involving § 1406(a), mandamus may be appropriate in a § 1404 (a) situation because venue has been determined to be proper in the forum and mandamus may be needed to analyze whether the district court considered the proper factors in ordering a transfer. But where, as here, venue is improper in the first instance as a matter of law, mandamus is clearly unavailable as there is no usurpation of judicial power or abuse of discretion justifying the extraordinary writ. *Bankers Life and Casualty Co.* v. *Holland, supra.*

The circumstances of this case emphasize the importance of the policy of requiring a final judgment as a prerequisite to appeal and the prohibition against interlocutory appeals. Here, the Court of Appeals ruled that both jurisdiction and venue were proper in the District of Columbia, yet there was no factual basis for such a finding. Every affidavit on file reflects that none of the moving defendants are doing business in the District of Columbia (App. O, Q, R, S) and that their conduct and connection with the District of Columbia are not such that they could reasonably anticipate being called upon to answer a suit in that forum.

See, World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980). Aside from the lack of a factual foundation for the court's ruling, the issues in this case have not narrowed to the point where appellate review is meaningful,[19] nor have all the potential issues of this case surfaced. Despite these considerations, these Petitioners are now forced to seek relief from this Court because the *dicta* in the Order of the Court of Appeals concerning the jurisdiction and venue issues which were never briefed or properly before that Court, may be construed as the law of the case at both the trial and appellate levels absent review by this Court.

II. The United States Court of Appeals for the District of Columbia Circuit, in Refusing to Follow the Federal Rules of Appellate Procedure and Its Own Local Rules, Has so far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

The judgment of the Court of Appeals should be reversed not only because mandamus was inappropriate, but also because the Court of Appeals failed to follow the applicable appellate rules in its consideration of this case. The petition for a writ of mandamus was filed in the Court of Appeals on May 4, 1981. These Petitioners (respondents in the Court of Appeals) were then ordered on May 27, 1981, to respond to the aforesaid petition within twenty days (App. D). Responses were timely filed, but thereafter, without notice to the respondents of when to file briefs or of the

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[19] For example, the petition for a writ of mandamus identified three issues relating in general to discovery, dismissal and choice-of-law in addition to the jurisdictional and venue issues presented to the Court of Appeals.

date for oral argument, the Court of Appeals ordered that the writ of mandamus should issue (App. A). The decision not to allow oral argument was in violation of appellate procedure as it was presumably made by only two judges rather than the required three judge panel since "Circuit Judge McGowan did not participate in [the] order" (App. A at 2a).

A. The Petition for a Writ of Mandamus Was Granted Without Notice to the Parties that the Court would do so Without the Requirement of Briefs or Oral Argument.

Rule 21 of the Federal Rules of Appellate Procedure governs the issuance of extraordinary writs. The pertinent text of F.R. App. P. 21(b)[20] evidences that two responses to a petition for a writ of mandamus were contemplated by the drafters of the rule. The first response is an answer to the petition addressing whether the extraordinary writ is available; if so, briefs are to be allowed on the merits of the underlying action giving rise to the extraordinary writ. By the use of the word "shall" in F.R. App. P. 21(b), the respondent

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[20] F.R. App. P. 21(b) states: (b) DENIAL; ORDER DIRECTING ANSWER. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire or appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

is allowed to anticipate this bifurcated procedure and is prejudiced when not allowed to submit a brief in support of the actions of the lower court.

Had a brief been allowed these Petitioners would have addressed the issue which the Court of Appeals apparently felt was crucial, that is, whether the "doing business" test for *in personam* jurisdiction under the local long-arm statute, 13 D.C. Code Ann. § 423 (1981 ed.), is identical to the "doing business" test for venue purposes under 28 U.S.C. § 1391(c). These Petitioners did not brief that issue as the only question properly before the court was whether mandamus was appropriate to vacate the transfer order of the district court pursuant to 28 U.S.C. § 1406(a) and because an appellate court will not normally decide issues not properly before it. These Petitioners vigorously contend that their total absence of any contact or connection with the District of Columbia and their lack of conduct with respect to that forum would have proven decisive of both the jurisdictional and venue issues. *See,* e.g., *World Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980). In addition, there is respectable authority for the proposition that the "doing business" tests for jurisdiction and venue purposes involve different criteria. *See, Remington-Rand, Inc.* v. *Knapp Monarch Co.,* 139 F.Supp. 613 (E.D. Pa. 1956), and *Mosley* v. *Nationwide Purchasing, Inc.,* 485 F.2d 418 (Temp. Em. Ct. App. D.C. 1973), and *See Part I, supra.* Thus, the failure to allow these Petitioners the opportunity to elaborate on the aforementioned issues seriously prejudiced these Petitioners as the proper resolution of the issue under the facts of this case should have resulted in the denial of the petition for a writ of mandamus.

B. The Oral Argument Was Denied Without the Unanimous Consent of a Three Judge Panel.

These authorities could also have been further explained had the Court of Appeals allowed oral argument as required by F.R. App. P. 21(b). The reliance upon Rule 21(b) by these Petitioners was based not only on that rule but also on F.R. App. P. 34,[21] and local Rule 11(d)[22] of the United States Court of Ap-

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[21] F.R. App. P. 34 states: Rule 34. Oral Argument. (a) IN GENERAL: LOCAL RULE. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rules shall provide any party with an opportunity to file a statement setting forth the reasons why, in his opinion, oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard: Oral argument will be allowed unless: (1) the appeal is frivolous or (2) the dispositive issue or set of issues has been recently authoritatively decided; or, (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. (b) NOTICE OF ARGUMENT: POSTPONEMENT. The clerk shall advise all parties whether oral argument is to be heard, and if so, of the time and place therefor, and the time to be allowed each side. A request for postponement of the argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing.

[22] D.C. Cir. R. 11(d) states: (d) DISPOSITION WITHOUT ORAL ARGUMENT. Whenever the Court *sua sponte* or on suggestion of a party, concludes that oral argument will not be needed, it may, after causing notice to be given by the Clerk to the parties of that determination, proceed to dispose of the case without oral argument. The determination that a case is to be decided without oral argument must be unanimously made by a three-judge division of the Court after due consideration of the following factors, and

peals for the District of Columbia Circuit. As previously mentioned, these Petitioners were never advised of the determination of the Court of Appeals to proceed without oral argument. Therefore, Petitioners were not able to move the Court for restoration of the case to the argument calendar. Further, the local rule states that a three judge division *must* unanimously decide to forego oral argument and the federal rule has the similar wording: "shall unanimously [be] of the opinion that oral argument is not needed." Here, these rules were ignored since Judge McGowan did not participate in the decision (App. A at 2a). Finally, there is no record that the Court of Appeals duly considered the three factors cited in the local rule, thus making an examination of this issue by this Court impossible.

The failure of the Court of Appeals to follow its own rules or the Federal Rules of Appellate Procedure demonstrates that the Court did not properly consider the merits of the case or the implications of its holding. This Court should therefore invoke its supervisory power over the Court of Appeals and reverse the judgment of the Court of Appeals.

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any others thought appropriate in the context of the particular case: (1) the appeal is frivolous or (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and oral argument would not significantly aid the Court. Motions for restoration to the argument calendar may be made within five days of the date of the order advising counsel of this Court's determination that the case is to be decided without oral argument. Counsel should be aware, however, that the Court thoroughly evaluated the case before the issuance of the order.

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia Circuit must be reviewed. That Court has granted a writ of mandamus despite the dispositive holding of this Court that mandamus is not available under the circumstances presented below. The ramifications of the procedural and substantive law set forth in the opinion of the Court of Appeals have implications far beyond the particular facts of this case, as that Court has expressed its willingness to review every transfer order of its district court via mandamus. Literally hundreds of cases are potentially affected by the Order of the Court of Appeals herein. If the Order is allowed to stand, an extraordinary remedy will be transformed into a typical appellate procedure contrary to the expressed policy of Congress and this Court to restrict appeals prior to final judgment. The power thus assumed by the United States Court of Appeals for the District of Columbia Circuit is unmatched by any other court of appeals and ignores the comity of those courts of appeals.

It is clear that the Court of Appeals did not consider the implications of its holding as demonstrated by that Court's refusal to follow its own rules and the Federal Rules of Appellate Procedure. These Petitioners will suffer great prejudice by the unreasoned opinion of the Court of Appeals as that Court ruled on issues which may be determinative of this case without allowing these Petitioners to brief those issues. Thus, for the reasons stated above, the Writ of Certiorari should be granted, the Writ of Mandamus vacated, and the Or-

der of the district court transferring this case to the United States District Court for the District of Maryland should be reinstated.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

No. 81-1482

Civil Action No. 80-1012

IN RE:

DANIEL G. GROVE,
Executor of the Estate
of Stuart Stiller,
Petitioner

BEFORE: McGowan, Tamm and Edwards, Circuit Judges

ORDER

Filed July 2, 1981

Upon consideration of the petition for a writ of mandamus and the responses thereto, it is

ORDERED that the writ of mandamus shall issue. The order of the district court transferring this case to the District of Maryland is vacated, and the case is remanded for further proceedings.

A writ of mandamus is the appropriate remedy in this case to vacate the transfer order of the district court. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953) is not dispositive. In that case, "whatever 'judicial inconvenience and hardship' [existed would] remain, after transfer, within the realm of the same court of appeals which had denied the writ, since both of the districts were within that circuit . . . ." *Id.* at 384. In this case the district court's finding of improper venue in the District of Columbia would evade review absent the remedy of mandamus. The district court found that the defend-

ants were "doing business" in the District of Columbia under the standards of *International Shoe* v. *Washington*, 326 U.S. 310 (1945), and under 13 D.C. Code § 423(a)(1). The defendants were, therefore, "doing business" in the District of Columbia for purposes of venue under 28 U.S.C. § 1391(c). *See Houston Fearless Corp.* v. *Teter*, 318 F.2d 822, 825 (10th Cir. 1963); *see also McKenna* v. *Udall*, 418 F.2d 1171 (D.C. Cir. 1969).

Per Curiam

Circuit Judge McGowan did not participate in this order.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1980

No. 81-1482

Civil Action No. 80-01012

IN RE:

DANIEL G. GROVE,
Executor of the Estate
of Stuart Stiller,
Petitioner

BEFORE: Tamm and Edwards, Circuit Judges

ORDER

Filed August 5, 1981

On consideration of respondents' joint motion to set aside order issuing writ of mandamus, and respondents' petition for rehearing, it is

ORDERED by the Court that the aforesaid motion to set aside is denied, and, it is

FURTHER ORDERED by the Court that the petition for rehearing is denied.

Per Curiam.

FOR THE COURT:
George A. Fisher,
Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

No. 81-1482

Civil Action No. 80-01012

IN RE:

DANIEL G. GROVE,
Executor of the Estate
of Stuart Stiller

Petitioner

BEFORE: Robinson, Chief Judge, Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Filed August 5, 1981

On consideration of respondents' motion to set aside order issuing writ of mandamus, and of the suggestion for rehearing *en banc*, it is

ORDERED by the Court *en banc* that the motion to set aside is denied, and, no member of the Court having called for a vote on the suggestion for rehearing *en banc*, it is

FURTHER ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:
George A. Fisher,
Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1980

No. 81-1482

Civil Action No. 80-01012

IN RE:

DANIEL G. GROVE,
Executor of the Estate
of Stuart Stiller
Petitioner

BEFORE: Wright, MacKinnon and Mikva, Circuit Judges

ORDER

Filed May 27, 1981

On consideration of petitioner's petition for writ of mandamus, filed May 4, 1981, it is

ORDERED that response(s) to the aforesaid petition be filed within twenty days from the date of this order.

Per Curiam

Circuit Judge Mikva did not participate in the foregoing order.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1012

DANIEL G. GROVE
Executor of the Estate of
Stuart Stiller
Plaintiff

v.

HEISHMAN BMW, INC., et al
Defendants

MEMORANDUM OPINION

Filed February 27, 1981

This matter is before the Court on motion of defendants' Bayerische Motoren Werke (BMWAG), BMW of North America, Inc. (BMWNA) and Lohr & Bromkamp GmbH (Lohr) for reconsideration of the Court's orders denying their motions to dismiss or in the alternative to transfer this action to the District of Maryland. Heishman BMW, Inc., a fourth defendant, has not so moved but has expressed no objection. After their motions were denied, defendants moved to certify the Court's orders denying their motions under 28 U.S.C. § 1292(b). For the reasons set forth below, the Court will transfer this action to Maryland and deny defendants' motions to certify.

Facts

Plaintiff, the executor of decedent's estate, and a resident of the State of Maryland, has brought suit for in-

juries resulting in death sustained in an automobile accident which occurred in the State of Maryland. Plaintiff alleges principally that death was caused by a defect in a 1978 BMW 530i automobile manufactured in Germany by BMWAG, a German corporation, and imported and distributed in this country by defendant BMWNA, a Delaware corporation, with its principal place of business in New Jersey. The defect is said to originate in a component part manufactured in Germany by defendant Lohr, a German corporation. The auto involved herein was purportedly sold by defendant Heishman BMW, Inc., a Virginia corporation, to the Maryland National Bank, a Maryland corporation, and not a party herein. The bank leased it to the D.C. law firm of Stiller, Adler, Schwartz & Kaswell, P.C., also not a party herein. The decedent resided in the District of Columbia. Subject matter jurisdiction is conferred on this Court by 28 U.S.C. § 1332.

Jurisdiction

Defendants are subject to the jurisdiction of this Court pursuant to D.C.C. § 13-423(a)(1). The jurisdictional extent of D.C.C. § 13-423(a)(1) is co-extensive with that of the due process clause; e.g., *Environmental Research International, Inc. v. Lockwood Greene Engineers, Inc.*, 355 A.2d 808, 810-811 (DCCA 1976) (*en banc*), and is limited only by principles first set forth in *International Shoe v. Washington*, 326 U.S. 310 (1945) and developed further in its progeny. Defendants' conduct in connection with the automobile at issue is such that they should reasonably anticipate being brought into court. The distribution and sale of BMW autos are not isolated occurrences. Substantial numbers are sold in this country. It is certain that BMWAG manufactures all BMW 530i's, all of which contain Lohr's part, and all of which are imported and distributed by BMWNA. These elements of certainty provide reasonable anticipation of suit.

Venue

The venue statute, 28 U.S.C. § 1391, provides in pertinent part:

> (a) a civil action wherein jurisdiction is founded only on diversity of citizenship may . . . be brought only in the judicial district where all the plaintiffs or all defendants reside or in which the claim arose.

Plaintiff herein maintains an office in D.C. but resides in Maryland. It is his residence that is relevant for venue purposes. *Leonard v. Wharton*, 268 F.Supp. 715 (D. Md. 1968), appeal dismissed, 396 F.2d 452 (4th Cir. 1968), *cert. denied*, 393 U.S. 1028 (1969).

None of the moving defendants reside here. Section 1391(c) provides:

> A corporation may be sued in any judicial district in which plaintiff is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

None of the moving defendants is incorporated or licensed to do business in D.C. Additionally, although the Court finds their conduct sufficient to confer *in personam* jurisdiction consistent with the due process clause, no moving defendants' activities constitute doing business within the meaning of Section 1391(c). *Remington Rand, Inc. v. Knapp-Monarch Co.*, 139 F. Supp. 613, 617, 618 (E.D. Pa. 1956); *see Mosley v. Nationwide Purchasing, Inc.*, 485 F.2d 418, 421 and n.4 (Temp. Em. Ct. App. 1973).

Moreover, the fatal injury and subsequent death occurred in Maryland, and this claim, therefore, arose in Maryland. *Lamont v. Haig*, 590 F.2d 1124 (D.C. Cir. 1978). The Court notes parenthetically that Maryland substantive law applies. *Lewis v. Reconstruction Finance Corp.*, 85 U.S. App. D.C. 339 (1949).

The Court finds, therefore, that venue is improper in this district. 28 U.S.C. § 1406(a) in pertinent part states:

> The District Court of a district in which is filed a case laying venue in the wrong . . . district shall dismiss, or if it be in the interest of justice, transfer such case to any district . . . in which it could have been brought.

The Court will transfer this action to the District of Maryland where the plaintiff resides, *Leonard, supra,* and the claim herein arose. *Lamont, supra.*

An appropriate order is entered herewith.

/s/ JUNE L. GREEN
June L. Green
U.S. District Judge

Dated: February 27, 1981

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1012

DANIEL G. GROVE
Executor of the Estate of
Stuart Stiller
Plaintiff

v.

HEISHMAN BMW, INC., et al
Defendants

ORDER

Filed February 27, 1981

In accordance with the memorandum opinion filed herewith, it is by the Court, this 27th day of February 1981,

ORDERED that the Clerk of this Court transfer the record herein to the United States District Court for the District of Maryland; and it is further

ORDERED that defendants' motions to certify under 28 U.S.C. § 1292(b) be denied.

/s/ JUNE L. GREEN
June L. Green
U.S. District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Number: 80-1012

DANIEL G. GROVE
Executor of the Estate of
Stuart Stiller
Plaintiff

VS.

HEISHMAN BMW, INC.
BMW OF NORTH AMERICA, INC.
BAYERISCHE MOTOREN WERK AG,
LOHR & BROMKAMP GmbH
Defendants

ORDER

Filed April 6, 1981

Upon consideration of the Plaintiff's Motion to Reconsider the Memorandum Opinion of February 27, 1981, and the Oppositions thereto, it is this 3rd day of April, 1981,

ORDERED, that the Plaintiff's Motion for Reconsideration is denied, and it is further

ORDERED, that the Clerk of this Court transfer the record herein to the United States District Court for the District of Maryland.

/s/ JUNE L. GREEN
June L. Green
United States District Judge
United States District Court
for the District of Columbia

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1012
(Green, J.)

DANIEL G. GROVE,
Executor of the Estate of
Stuart Stiller,
Plaintiff,

v.

HEISHMAN BMW, INC.
BMW OF NORTH AMERICA, INC.
BAYERISCHE MOTOREN WERKE AG.
LOHR & BROMKAMP GmbH.,
Defendants.

ORDER

Filed August 11, 1980

Upon consideration of the Motion of Defendants BMW of North America, Inc. and Bayerische Motoren Werke AG. for Reconsideration of their Motions to Dismiss for Want of Jurisdiction or in the Alternative for Change of Venue, and the opposition thereto,

IT IS HEREBY ORDERED, this 11th day of August, 1980, that the Motion for Reconsideration is denied.

/s/ JUNE L. GREEN
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1012
(Green, J.)

DANIEL G. GROVE,
Executor of the Estate of
Stuart Stiller,
Plaintiff,

v.

HEISHMAN BMW, INC.
BMW OF NORTH AMERICA, INC.
BAYERISCHE MOTOREN WERKE AG.
LOHR & BROMKAMP GmbH.
Defendants.

ORDER

Filed July 23, 1980

Upon consideration of the Motion of Bayerische Motoren Werke, AG. to Dismiss for Want of Jurisdiction or in the Alternative for Change of Venue, and the opposition thereto,

IT IS HEREBY ORDERED, this 22nd day of July, 1980, that the Motion is denied in all respects.

/s/ JUNE L. GREEN
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1012
(Green, J.)

DANIEL G. GROVE,
Executor of the Estate of
Stuart Stiller,
Plaintiff,

v.

HEISHMAN BMW, INC.
BMW OF NORTH AMERICA, INC.
BAYERISCHE MOTOREN WERKE AG.
LOHR & BROMKAMP GmbH.
Defendants.

ORDER

Filed July 23, 1980

Upon consideration of the Motion of BMW of North America, Inc. to Dismiss for Want of Jurisdiction or in the Alternative for Change of Venue, and the opposition thereto,

IT IS HEREBY ORDERED, this 22nd day of July, 1980, that the Motion is denied in all respects.

/s/ JUNE L. GREEN
United States District Judge

APPENDIX E

PERTINENT STATUTORY PROVISIONS

(a) 28 U.S.C. § 41. Number and composition of circuits

The twelve judicial circuits of the United States are constituted as follows:

Circuits Composition

District of Columbia—District of Columbia.

First—Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island.

Second—Connecticut, New York, Vermont.

Third—Delaware, New Jersey, Pennsylvania, Virgin Islands.

Fourth—Maryland, North Carolina, South Carolina, Virginia, West Virginia.

Fifth—District of the Canal Zone, Louisiana, Mississippi, Texas.

Sixth—Kentucky, Michigan, Ohio, Tennessee.

Seventh—Illinois, Indiana, Wisconsin.

Eighth—Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota.

Ninth—Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, Hawaii,

Tenth—Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming.

Eleventh—Alabama, Florida, Georgia.

(b) 28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United

States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

(c) 28 U.S.C. § 1292. Interlocutory decisions

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(d) 28 U.S.C. § 1254. Courts of apeals: certiorari: appeal: certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(e) 28 U.S.C. § 1332. Diversity of citizenship: amount in controversy: costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

• • •

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: . . .

(d) The word "States," as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(f) 28 U.S.C. § 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

• • •

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(g) 28 U.S.C. § 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(h) 28 U.S.C. § 1406. Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(i) 28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(j) 13 D.C. Code Ann. § 423. Personal Jurisdiction based upon conduct

(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's—

(1) transacting any business in the District of Columbia;

(2) contracting to supply services in the District of Columbia;

(3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;

(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;

(5) having an interest in, using, or possessing real property in the District of Columbia; or

(6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing.

(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

APPENDIX L

PLAINTIFFS

DANIEL G. GROVE, Executor of the Estate of Stuart Stiller

DEFENDANTS

1. HEISHMAN BMW, INC.
2. BMW OF NORTH AMERICA, INC.
3. BAYERISCHE MOTOREN WERKE AG.
4. LOHR & BROMKAMP GmgH.

JUNE L. GREEN, J.

CAUSE

Survival and wrongful death action arising our of the death of Stuart Stiller on August 4, 1979, from injuries sustained in an automobile accident on that date. 28 U.S.C. § 1332.

ATTORNEYS

Paul Martin Wolff
David N. Webster
Kevin T. Baine
Hill Building
Washington, D.C. 20006
(202) 331-5000

4. John J. McGrath, Jr.
   1850 K St., N.W., #1200
   Wash., D.C. 20006
   862-4730

1. John Jude O'Donnell
   730 15th St., N.W. #810
   Washington, D.C. 20005
   628-2244

2. Leonard L. Lipshultz
   John Llewellyn Hone
   Suite 108 Montgomery Center
   Silver Spring, Md. 20910
   587-8500

3. — do —

DATE—NR.—PROCEEDINGS
1980

Apr 22— 1 —COMPLAINT; Jury Demand; Appearance.

Apr 22— —SUMMONS (4) anc copies (4) of complaint issued. deft. #1 ser: 4-30-80 deft. #2 ser: 5-1-80.

May 22— 2 —STIPULATION extending the time for deft. Heishman to answer to and including 6-16-80; (fiat) (N) GREEN, J.

June 17— 3 —ANSWER of deft. #1 to complaint.

June 23— 4 —MOTION of deft. #2 to dismiss for want of jurisdiction or in the alternative for change of venue; P&As; exhibit I.

June 25— 5 —MOTION of deft. #4 for enlargement of time to 8-22-80 to move or answer; memo of P&A's; exhibits 1, 2, and 3.

Jun 26— 6 —ANSWER of deft. #4 to complaint. (fiat) GREEN, J.

Jun 27— 7 —MOTION of pltf. for an extension of time to respond to motion of deft. #2 to dismiss; P & A.

Jun 27— 8 —RESPONSE of deft. #4 to motion of deft. #2 to dismiss.

Jun 30— 9 —MOTION of deft. #3 to dismiss for want of jurisdiction or in the alternative for change of venue; Exhibit (unexecuted affidavit of Jost J. Schmitt); P & A.

June 30—10—ORDER denying motion of deft. Lohr & Bromkamps for enlargement of time to respond to the complaint. (N) GREEN, J.

DATE—NR.—PROCEEDINGS

June 30—11—ORDER granting to and including 7-14-80 motion of pltf. to respond to deft. BMW of No. America Inc.'s to dismiss for want of jurisdiction or in alternative for change of venue. (N) GREEN, J.

July 14—12—REQUEST by pltf. for oral argument; P&As; exhibits A-G.

Jul 24—13—AFFIDAVIT of Jost J. Schmitt in support of deft. #3's motion to dismiss forlack of jurisdiction over the person.

Jul 24—14—ORDER filed 7-23-80, denying motion of Bayerische Motoren Werke Ag. to dismiss. (N) (signed 7-22-80). GREEN, J.

July 24—15—ORDER filed 7-23-80, denying motion of BMW of No. America to dismiss. (N) (signed 7-22-80). GREEN, J.

Aug 04—16—MOTION of defts. for reconsideration of deft's motion to dismiss for want of jurisdiction or in the alternative for change of venue; exhibit A; affidavit of Howard F. Breckenridge; request for oral argument; P&As.

Aug 07—17—OPPOSITION by pltf's. to motion for reconsideration.

Aug 15—18—ORDER filed 8-11-80, denying motion of defts. BMW of North America, Inc. and Bayerische Motoren Werke AG. for reconsideration of the motions to dismiss for want of jurisdiction or in the alternative for a change of venue.

PLAINTIFF—GROVE

DEFENDANT—HEISHMAN BMW, INC., et al.

DOCKET No. 80-1012

DATE—NR.—PROCEEDINGS

Aug 22—19—ANSWER of defts. 2&3 to complaint.

Aug 22— —CALENDARED. CD/N

Aug 22—20—INTERROGATORIES by deft. #2 to pltf.

Aug 29—21—MOTION of deft #4 to dismiss; request for oral argument; memorandum; exhibits A&B.

Sep 02—22—MOTION by pltf. for an extension of time within which to respond to deft. #4's motion to dismiss.

Sept 05—23—ERRATA of deft. re: table of authorities and table of contents inadvertently omitted from the memorandum in support of Motion to Dismiss of Lohr & Bromkamp GmbH; attachment.

Sept 8—24—MEMORANDUM of points and authorities by pltf. in opposition to deft's motion to dismiss or, in the alternative, to transfer to the District of Maryland; attachment; exhibits A-G.

Sept 11—25—ORDER filed 9-9-80, denying motion of deft. Lohr & Bromkarp GmgH to dismiss for lack of personal jurisdiction and improper venue or to transfer to Maryland. (N) (signed 9-8-80) GREEN, J.

Sept 11—26—REPLY of deft/ #4 to pltf's opposition to deft. Lohr & Bromkamp GmbH's motion to dismiss or, in the alternative, to transfer to the District of Maryland.

DATE—NR.—PROCEEDINGS

Sept 17—27—MOTION of deft. #4 to amend the 9-8-80 order to include certification Under 28 U.S.C. 1292(b); request for oral argument; memo; table of authorities.

Sept 17—28—MOTION of defts. for leave to appeal interlocutory order; P&As.

Sept 17— —STATUS CALL: Motion of defts. for reconsideration of the denial of their motions to dismiss and for change of venue heard and taken under advisement. Pltf. to address both motions as soon as possible. Further status call set for 11-13-80 at 10:00AM. (Rep: Gloria Horning). GREEN, J.

Sept 22—29—TRANSCRIPT of Proceedings taken on 9-17-80, Court's copy; Rep: Gloria Horning. GREEN, J.

Sept 23—30—SUPPLEMENTAL MEMORANDUM by deft. #4 in support of motion to dismiss or to certify under 28 U.S.C. 1292(b); attachment.

Sept 29—31—MEMORANDUM of pltf. of points and authorities in opposition to motion of defts. to certify orders under 28 U.S.C. 1292(b).

Sept 30—32—REPLY of deft. to pltf's opposition to certification under 28 U.S.C. 1292(b).

Nov 3—33—ANSWERS by Daniel G. Grove to Interrogatories; Exhibits 1 through 24

Nov 13— —STATUS CALL. Motion of defts. for reconsideration of denial of transfer, heard & taken under advisement. (Rep. Gloria Horning) Green, J.

1981

Feb 27—34—MEMORNADUM OPINION. (N) GREEN, J.

DATE—NR.—PROCEEDINGS

Feb 27—35—ORDER transferring this to the U.S.D.C. for the District of Maryland (N) GREEN, J

Mar 09—36—MOTION of pltf. for reconsideration; P&As.

Mar 09—37—REQUEST by pltf. oral argument. CD/N

Mar 20—28—SUPPLEMENTAL MEMORNADUM by pltf. in support of pltf's motion for reconsideration; affidavit of Kevin T. Baine; exhibits 1&2.

Mar 25—29—OPPOSITION by defts. #2&3 to pltf's motion for reconsideration

Mar 27—30—REPLY MEMORANDUM by pltf. in support of pltf's motion for reconsideration.

Mar 30—31—LETTER dated 2-26-81 to Judge Green in re: transferring this action to Maryland; "Let this be filed". (N) GREEN, J.

Apr 8—32—ORDER filed 4-6-81 denying motion of pltf. for reconsideration; directing the Clerk of this Court to transfer this record to the U.S. D.C. for the District of Maryland. (N) GREEN, J.

Apr 14—33—MOTION of pltf. for certification under 28 U.S.C. § 1292(b); P&As; request for oral argument.

Apr 27—34—OPPOSITION by defts. 2&3 to pltf's motion for certification under 28 U.S.C. §1292 (b); P&As.

May 1—35—ORDER filed 4/28/81 denying motion of pltf. for certification under 28 U.S.C. Section 1292 (b) (N) JUNE GREEN, J.

July 2—36—COPY of ORDER filed 7-2-81, in USCA issuing the writ of mandamus; vacating the Order of

DATE—NR.—PROCEEDINGS

USDC transferring case to District of Maryland and for remanding case for further proceedings.

Oct 05—37—REQUEST by Defts. BMW of North America for entry upon land for inspection and other purposes.

Oct 05—38—REQUEST by defts. BMW of North America for production of documents and things.

Oct 05—39—REQUEST (first) by Pltf. for Production of documents by Deft. Bayerisch Motoren Werke, AG.

Oct 05—40—REQUEST (first) by Pltf. for production of documents by deft. BMW of North America, Inc.

Oct 05—41—REQUEST (first) by Pltf. for production of documents by Deft. Heishman BMW, Inc.

Oct 05—42—INTERROGATORIES (first) by Pltf. to Deft. Heishman BMW, Inc.

Oct 05—43—INTERROGATORIES (first) by Pltf. to deft. BMW of North America, Inc

Oct 05—44—INTERROGATORIES (first) by Pltf. to deft. Bayerische Motoren Werke AG.

Oct 05—45—JOINT MOTION by defts. #2, #3 and #4 for reconsideration of the in personam jurisdictional finding of this Court; Memo of P&A's.

Oct 13—46—MEMORANDUM of points and authorities by pltf. in opposition to defts' joint motion for reconsideration.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1012
(June L. Green, J.)

DANIEL G. GROVE,
Executor of the Estate of Stuart Stiller
2033 M Street, N.W.
Washington, D.C. 20036,

Plaintiff,

v.

HEISHMAN BMW, INC.
3154 Jefferson Davis Highway
Arlington, Virginia 22202,

Serve pursuant to D.C. Code § 13-431(a)(3)

BMW OF NORTH AMERICA, INC.
BMW Plaza
Montvale, New Jersey 07645,

Serve pursuant to D.C. Code § 13-431(a)(3)

BAYERISCHE MOTOREN WERKE AG.
BMW Haus
Petuelring 130
Postfach 40 02 40
D-8000 Munchen 40
Federal Republic of Germany,

Serve pursuant to 20 U.S.T. 361

LOHR & BROMKAMP GmbH.
Muehlheimer Strasse 163
Offenbach am Main
Federal Republic of Germany,

Serve pursuant to 20 U.S.T. 361

Defendants.

COMPLAINT

Jurisdiction

1. This is a survival and wrongful death action arising out of the death of Stuart Stiller on August 4, 1979, from injuries sustained in an automobile accident on that date.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332, in that the manner in controversy exceeds the sum of $10,000, exclusive of interest and cost, and is between citizens of different states in which citizens or subjects of a foreign state are additional parties.

Parties

3. Plaintiff, Daniel G. Grove, is a citizen of the State of Maryland, with his business address at 2033 M Street, N.W., Washington, D.C. He is the duly qualified Executor of the Estate of Stuart Stiller, Case No. 1716-79 of the Probate Division of the Superior Court of the District of Columbia.

4. The deceased, Stuart Stiller, was a citizen of the District of Columbia at the time of his death, maintaining his residence at 4701 Connecticut Avenue, N.W., #506, Washington, D.C. He was an attorney with the law firm Stiller, Adler, Schwartz & Kaswell, P.C., a professional corporation organized under the laws of the District of Columbia, with its principal place of business at Suite 720, 1825 K Street, N.W., Washington, D.C. 20006.

5. Defendant Heishman BMW, Inc. ("Heishman") is a corporation organized under the laws of Virginia, with its principal place of business at 3154 Jefferson Davis Highway, Arlington, Virginia 22202. Heishman sold the BMW automobile driven by the deceased at the time of the fatal accident to the Maryland National Bank for lease to Stiller, Adler, Schwartz & Kaswell, P.C. (then Stiller, Adler & Schwartz, P.C.), and it serviced that automobile on a

continuing basis from the date of sale through the time of the accident. It transacted business and contracted to supply services in the District of Columbia in connection with the sale, lease and servicing of the aforementioned BMW automobile; and it regularly does and solicits business in the District of Columbia, engages in other persistent conduct in the District of Columbia, and derives substantial revenue from goods used and services rendered in the District of Columbia.

6. Defendant BMW of North America, Inc. ("BMW North America") is a corporation organized under the laws of Delaware, with its principal place of business at BMW Plaza, Montvale, New Jersey 07645. BMW North America is a subsidiary of, and North American distributor for, defendant Bayerische Motoren Werke AG. It sold the BMW automobile driven by the deceased at the time of the fatal accident to defendant Heishman, and it has sold numerous other BMW automobiles to defendant Heishman with the knowledge and expectation that many of these cars would be sold or leased to District of Columbia residents and others for use in the District of Columbia. Both directly and through its agent, defendant Heishman, defendant BMW North America transacted business in the District of Columbia in connection with the sale and lease of the BMW automobile driven by the deceased at the time of the fatal accident; and it regularly does and solicits business in the District of Columbia, engages in other persistent conduct in the District of Columbia, and derives substantial revenue from goods used and services rendered in the District of Columbia.

7. Defendant Bayerische Motoren Werke AG. ("BMW Germany") is a corporation organized under the laws of the Federal Republic of Germany, with its principal place of business in Munich, Federal Republic of Germany. Defendant BMW Germany designed, manufactured and assembled the BMW automobile (and component parts)

driven by the deceased at the time of the fatal accident and sold that automobile to defendant BMW North America, as it has numerous other BMW automobiles, with the knowledge and expectation that many of these automobiles would be sold or leased to District of Columbia residents and others for use in the District of Columbia. Both directly and through its agents, defendants BMW North America and Heishman, defendant BMW Germany transacted business in the District of Columbia in connection with the sale and lease of the BMW automobile driven by the deceased at the time of the fatal accident; and it regularly does and solicits business in the District of Columbia, engages in other persistent conduct in the District of Columbia, and derives substantial revenue from goods used and services rendered in the District of Columbia.

8. Defendant Lohr & Bromkamp GmbH. is a corporation organized under the laws of the Federal Republic of Germany, with its pricipal place of business in Offenbach am Main, Federal Republic of Germany. Defendant Lohr & Bromkamp designed, manufactured and assembled the constant velocity joints installed in the BMW automobile driven by the deceased at the time of the fatal accident. It supplied such constant velocity joints to BMW Germany with the knowledge and expectation that a substantial number of automobiles in which they were to be installed would be sold or leased to District of Columbia residents and others for use in the District of Columbia. Both directly and through its agents, defendants BMW Germany, BMW North America and Heishman, it transacted business in the District of Columbia in connection with the sale and lease of the BMW automobile driven by the deceased at the time of the fatal accident; and it regularly does and solicits business in the District of Columbia, engages in other persistent conduct in the District of Columbia, and derives substantial revenue from goods used and services rendered in the District of Columbia.

Common Allegation of Fact

9. At approximately 9:10 a.m. on August 4, 1979, the deceased, Stuart Stiller, was driving a 1978 BMW 530i automobile in a northerly direction on Wisconsin Avenue in Bethesda, Maryland, less than one mile north of the District of Columbia line. Stiller was driving in a safe and prudent manner, in accordance with the traffic rules then and there in force, when his automobile became uncontrollable, swerved suddenly to the right, and collided with a tree along the right side of the road. Stiller died several hours later from injuries sustained in the accident.

Count I—Survival Action for Negligence

10. Plaintiff incorporates by reference the allegations contained in Paragraph 3 through 9.

11. Defendants Heishman, BMW North America, BMW Germany, and Lohr & Bromkamp were negligent in the design, manufacture, inspecting, testing, assembling and/or sale and lease of the BMW automobile driven by the deceased at the time of the fatal accident, and its component parts, in that they knew or with the exercise of reasonable care should have known that the right rear constant velocity joint and its related parts were dangerous under circumstances of ordinary, normal and foreseeable use.

12. As a proximate result of the defendants' negligence, the deceased suffered severe injuries, resulting in death, and his estate was deprived of his probable future earnings in an amount not yet fully determined.

WHEREFORE, plaintiff Grove, as Executor of the Estate of Stuart Stiller, Deceased, demands judgment against defendants in the sum of $3,000,000, plus interest from the date of judgment and the taxable costs of this action.

Count II—Survival Action for Breach of Warranty

13. Plaintiff incorporates by reference the allegations contained in Paragraphs 3 through 9.

14. Defendants Heishman, BMW North America, BMW Germany, and Lohr & Bromkamp warranted that the 1978 BMW automobile driven by the deceased, and its component parts, would be fit for their ordinary, normal and foreseeable use, and not defective or unreasonably dangerous, when they placed and moved the automobile and its component parts in the stream of commerce for sale and use.

15. Defendants breached their implied warranties in that the BMW automobile and, in particular, the right rear constant velocity joint and its related parts were defective when sold, unreasonably dangerous, and unfit for their ordinary, normal and foreseeable use.

16. As a proximate result of the defendants' breaches of warranties, the deceased suffered severe injuries, resulting in death, and his estate was deprived of his probable future earnings in an amount not yet fully determined.

WHEREFORE, plaintiff Grove, as Executor of the Estate of Stuart Stiller, Deceased, demands judgment against defendants in the sum of $3,000,000, plus interest from the date of judgment and the taxable costs of this action.

Count III—Survival Action for Strict Liability

17. Plaintiff incorporates by reference the allegations contained in Paragraphs 3 through 9.

18. Defendants Heishman, BMW North America, BMW Germany, and Lohr & Bromkamp are made strictly liable to plaintiff by their placing and moving in the stream of commerce the aforementioned BMW automobile, constant velocity joint and related parts with defects in their design and/or manufacture.

19. As a proximate result of defendants' placing and moving in the stream of commerce the aforementioned BMW automobile, constant velocity joint and related parts, the deceased suffered severe injuries, resulting in death, and his estate was deprived of his probable future earnings in an amount not yet fully determined.

WHEREFORE, plaintiff Grove, as Executor of the Estate of Stuart Stiller, Deceased, demands judgment against defendants in the sum of $3,000,000, plus interest from the date of judgment and the taxable costs of this action.

Count IV—Survival Action for Negligence

20. Plaintiff incorporates by reference the allegations contained in Paragraphs 3 through 9.

21. Defendant Heishman was negligent in the servicing and repair of the aforementioned BMW automobile, in that it failed to detect and repair the unreasonably dangerous condition of the right rear constant velocity joint and its related parts, when through the exercise of reasonable care it should have detected and repaired that condition.

22. As a proximate result of defendant's negligence, the deceased suffered severe injuries, resulting in death, and his estate was deprived of his probable future earnings in an amount not yet fully determined.

WHEREFORE, plaintiff Grove, as Executor of the Estate of Stuart Stiller, Deceased, demands judgment against defendant Heishman in the sum of $3,000,000, plus interest from the date of judgment and the taxable costs of this action.

Count V—Wrongful Death Action

23. Plaintiff incorporates by reference the allegations contained in Paragraphs 3 through 22.

24. As a proximate result of the aforementioned conduct of defendant Heishman, resulting in the injury and death

of the deceased, deceased's next of kin suffered the loss of future financial contributions that the deceased would have made for their care and maintenance, the loss of the services of care, maintenance and attention which they would have received from the deceased, as well as the expenses of the deceased's last illness and burial.

WHEREFORE, plaintiff Grove, as Executor of the Estate of Stuart Stiller, Deceased, demands judgment against defendant Heishman in the sum of $3,000,000, plus interest from the date of judgment and the taxable costs of this action.

Count VI—Wrongful Death Action

25. Plaintiff incorporates by reference the allegations contained in Paragraphs 3 through 19.

26. As a proximate result of the aforementioned conduct of defendant BMW North America, resulting in the injury and death of the deceased, deceased's next of kin suffered the loss of future financial contributions that the deceased would have made for their care and maintenance, the loss of the services of care, maintenance and attention which they would have received from the deceased, as well as the expenses of the deceased's last illness and burial.

WHEREFORE, plaintiff Grove, as Executor of the Estate of Stuart Stiller, Deceased, demands judgment against defendant BMW of North America in the sum of $3,000,000, plus interest from the date of judgment and the taxable costs of this action.

Count VII—Wrongful Death Action

27. Plaintiff incorporates by reference the allegations contained in Paragraphs 3 through 19.

28. As a proximate result of the aforementioned conduct of defendant BMW Germany, resulting in the injury and

death of the deceased, deceased's next of kin suffered the loss of future financial contributions that the deceased would have made for their care and maintenance, the loss of the services of care, maintenance and attention which they would have received from the deceased, as well as the expenses of the deceased's last illness and burial.

WHEREFORE, plaintiff Grove, as Executor of the Estate of Stuart Stiller, Deceased, demands judgment against defendant BMW Germany in the sum of $3,000,000, plus interest from the date of judgment and the taxable costs of this action.

Count VIII—Wrongful Death Action

29. Plaintiff incorporates by reference the allegations contained in Paragraphs 3 through 19.

30. As a proximate result of the aforementioned conduct of defendant Lohr & Bromkamp, resulting in the injury and death of the deceased, deceased's next of kin suffered the loss of future financial contributions that the deceased would have made for their care and maintenance, the loss of the services of care, maintenance and attention which they would have received from the deceased, as well as the expenses of the deceased's last illness and burial.

WHEREFORE, plaintiff Grove, as Executor of the Estate of Stuart Stiller, Deceased, demands judgment against defendant Lohr & Bromkamp in the sum of $3,000,000, plus interest from the date of judgment and the taxable costs of this action.

Count IX—Punitive Damages

31. Plaintiff incorporates by reference the allegations contained in Paragraphs 3 through 24.

32. Defendant Heishman acted with reckless disregard of the rights and safety of the deceased and other users

of BMW automobiles and their component parts, and with gross and wanton negligence with respect thereto.

WHEREFORE, plaintiff Grove, as Executor of the Estate of Stuart Stiller, Deceased, demands punitive damages against defendant Heishman in the sum of $5,000,000, plus interest from the date of judgment.

Count X—Punitive Damages

33. Plaintiff incorporates by reference the allegations contained in Paragraphs 3 through 19 and 26.

34. Defendant BMW North America acted with reckless disregard of the rights and safety of the deceased and other users of BMW automobiles and their component parts, and with gross and wanton negligence with respect thereto.

WHEREFORE, plaintiff Grove, as Executor of the Estate of Stuart Stiller, Deceased, demands punitive damages against defendant BMW North America in the sum of $5,000,000, plus interest from the date of judgment.

Count XI—Punitive Damages

35. Plaintiff incorporates by reference the allegations contained in Paragraphs 3 through 19 and 28.

36. Defendant BMW Germany acted with reckless disregard of the rights and safety of the deceased and other users of BMW automobiles and their component parts, and with gross and wanton negligence with respect thereto.

WHEREFORE, plaintiff Grove, as Executor of the Estate of Stuart Stiller, Deceased, demands punitive damages against defendant BMW Germany in the sum of $5,000,000, plus interest from the date of judgment.

Count XII—Punitive Damages

37. Plaintiff incorporates by reference the allegations contained in Paragraphs 3 through 19 and 30.

38. Defendant Lohr & Bromkamp acted with reckless disregard of the rights and safety of the deceased and other users of BMW automobiles and their component parts, and with gross and wanton negligence with respect thereto.

WHEREFORE, plaintiff Grove, as Executor of the Estate of Stuart Stiller, Deceased, demands punitive damages against defendant Lohr & Bromkamp in the sum of $5,000,000, plus interest from the date of judgment.

Respectfully submitted,

WILLIAMS & CONNOLLY

By /s/ PAUL MARTIN WOLFF
Paul Martin Wolff

By /s/ DAVID N. WEBSTER
David N. Webster

By /s/ KEVIN T. BAINE
Kevin T. Baine
Hill Building
Washington, D.C. 20006
202-331-5000

Attorneys for Plaintiff

Dated: April —, 1980

JURY DEMAND

Plaintiff demands a trial by jury as to all issues herein.

WILLIAMS & CONNOLLY

By /s/ PAUL MARTIN WOLFF
Paul Martin Wolff

By /s/ DAVID N. WEBSTER
David N. Webster

By /s/ KEVIN T. BAINE
Kevin T. Baine

Dated: April 22, 1980.

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80 1012

DANIEL G. GROVE
Executor of the Estate of Stuart Stiller
2033 M Street, N.W.
Washington, D.C. 20036,

Plaintiff,

v.

HEISHMAN BMW, INC.
3154 Jefferson Davis Highway
Arlington, Virginia 22202,

BMW OF NORTH AMERICA, INC.
BMW Plaza
Montvale, New Jersey 07645,

BAYERISCHE MOTOREN WERKE AG.
BMW Haus
Petuelring 130
Postfach 40 02 40
D-8000 Munchen 40
Federal Republic of Germany,

LOHR & BROMKAMP GmbH.
Muehlheimer Strasse 163
Offenbach am Main
Federal Republic of Germany,

Defendants

MOTION TO DISMISS FOR WANT OF JURISDICTION
OR
IN THE ALTERNATIVE FOR CHANGE OF VENUE

Comes now the defendant BMW of North America, Inc., (hereinafter referred to as BMWNA) by and though Lip-

shultz and Hone, Chartered, Leonard L. Lipshultz and John Llewellyn Hone and moves this Honorable Court for an order dismissing the complaint against this defendant, for want of *in personam* jurisdiction or, in the alternative, to change the venue for this litigation, and for reasons therefor states as follows:

1) The plaintiff, who is a resident of the state of Maryland, has brought suit against the defendant, BMWNA, for injuries resulting in death sustained in an automobile accident which occurred in the state of Maryland. The plaintiff alleges, *inter alia*, that said death was caused by a defect in a 1978 BMW 530i manufactured by the defendant Bayerische Motoren Werke AG and sold by it and this defendant.

2 The defendant Bayerische Motoren Werke AG, (hereinafter referred to as BMWAG) is a business affiliation similar in nature to a corporation and is organized under the laws of the Federal Republic of Germany, and as of the date of the filing of this motion had not as yet been served with service of process.

3) Defendant BMWNA is a corporation established under the laws of the State of Delaware, with its principal place of business in the State of New Jersey.

4) The plaintiff has not alleged, and this defendant denies that any acts of the defendant relevant to this litigation occurred within the District of Columbia, nor are the defendants, BMWNA or BMWAG, engaged in business in the District. Neither defendant is engaged in activities which establish sufficient contacts with the District of Columbia to warrant the assertion of jurisdiction thereover.

5) The cause of action complained of arose in the State of Maryland, and therefore, Maryland substantive law applies. Further, there is no proper allegation that venue lies in the District of Columbia.

6) Upon the face of the pleadings, it appears that the BMW automobile involved herein was sold by a Virginia corporation, Heischman's BMW Inc., to a Maryland Corporation, Maryland National Bank, which leased said automobile to the law firm of Stiller, Adler, Schwartz, and Kaswell, P.C. Upon information and belief, each such transaction occurred in the State of Maryland or the Commonwealth of Virginia but not in the District of Columbia.

7) Such other and further grounds as may be advanced upon a hearing of this motion.

WHEREFORE, the defendant requests that this Court enter an Order granting the defendant's Motion To Dismiss For Want of Jurisdiction or in the Alternative for Change of Venue.

LIPSHULTZ AND HONE, CHARTERED

/s/ LEONARD L. LIPSHULTZ
Leonard L. Lipshultz

/s/ JOHN LLEWELLYN HONE
John Llewellyn Hone
Suite 108 Montgomery Center
8630 Fenton Street
Silver Spring, Maryland 20910
587-8500

CERTIFICATE OF SERVICE

I Hereby Certify that a copy of the foregoing Motion To Dismiss For Want of Jurisdiction Or In The Alternative For Change of Venue, Memorandum of Points and Authorities In Support of Defendant's Motion To Dismiss For Want of Jurisdiction and the unexecuted Affidavit of Howard Breckenridge was mailed, postage prepaid this 17th day of June, 1980 to Paul Martin Wolfe, Esq., Hill Building, Washington, D.C. 20006, attorney for Plaintiff Grove, John Jude O'Donnell, Esq., 810 American Security Building 730 15th Street, N.W., Washington, D.C. 20005, attorney for Defendant Heishman, BMW, Inc., and to Daniel Bukovac, Esq., 1850 K. Street, N.W., Washington, D.C. 20006, attorney for Defendant Lohr & Bromkamp GmbH.

/s/ John Llewellyn Hone
John Llewellyn Hone

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80 1012

DANIEL G. GROVE
Executor of the Estate of Stuart Stiller
2033 M Street, N.W.
Washington, D.C. 20036,

Plaintiff,

v.

HEISHMAN BMW, INC.
3154 Jefferson Davis Highway
Arlington, Virginia 22202,

BMW OF NORTH AMERICA, INC.
BMW Plaza
Montvale, New Jersey 07645,

BAYERISCHE MOTOREN WERKE AG.
BMW Haus
Petuelring 130
Postfach 40 02 40
D-8000 Munchen 40
Federal Republic of Germany,

LOHR & BROMKAMP GmbH.
Muehlheimer Strasse 163
Offenbach am Main
Federal Republic of Germany,

Defendants

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION OR IN THE ALTERNATIVE FOR CHANGE OF VENUE

I. Lack of Jurisdiction Over The Person:

The defendant, BMWAG, neither directly nor through an agent, conducted business at any time relevant to this

litigation within the District of Columbia. All BMW automobiles imported into the United States were purchased in Germany by the importer, BMWNA; title thereto passes in Germany. The defendant, BMWNA, did not cause the vehicle in question to enter into an unbroken stream of commerce with the ultimate destination being the District of Columbia, and none of this defendant's nor the defendant BMWAG's manufacturing and selling activities are conducted within the United States.

The defendant, BMWNA, neither directly nor through an agent, conducted business in the District of Columbia. BMWNA denies that Heishman's is its agent in the District of Columbia as alleged in the complaint.

The defendants, BMWAG, and BMWNA, are not qualified to do business in the District of Columbia, do not own stock, merchandise or inventory in the District, have no bank account, place of business, office, warehouse or distribution center in the District and take no orders from agents therein. (See Exhibit I, affidavit of BMWNA—Executed copy to be filed separately.) Neither of said defendants make deliveries of automobiles in the District, either directly or through a distributor or dealer.

The plaintiff seeks to assert *in personam* jurisdiction over this defendant under the District of Columbia Wrongful Death and Survival Statutes, § 16-2701 et. seq., and 12-101 of the District of Columbia Code, and Title 28 USC § 1332, conferring diversity jurisdiction on District Courts and, presumably, the District of Columbia Long Arm Statute, § 13-423. This motion respectfully asserts that neither the defendant, BMWAG, nor this defendant, BMWNA, come within the *in personam* jurisdiction of the court by reason of the District of Columbia's "long arm" statute or otherwise.

The District of Columbia "long-arm" statute, D.C. Code § 13-423, provides:

(a) A District of Columbia Court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's:

(1) transacting any business in the District of Columbia;

(2) contracting to supply services in the District of Columbia;

(3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;

(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;

(5) having an interest in, using, or possessing real property in the District of Columbia; or

(6) contracting to insure or act as surety for or on behalf of any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing.

(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

Jurisdiction does not lie with this court under either paragraph (3) or (4) of subsection (a), as the plaintiff has alleged that the accident which underlies their claims oc-

curred in the State of Maryland and the afore-noted paragraphs require that there be "tortious injury" within the District of Columbia.

Paragraphs (5) and (6) are also clearly inapplicable since those relate only to actions involving real property and insurance. Similarly, paragraph (2) does not apply, since there is no allegation that BMWAG and BMWNA contracted to supply services in the District of Columbia.

As to paragraph (1), with respect to "transacting any business" in the District of Columbia, there is no sufficient allegation that the claims in any way "arose" from any business conducted by these Defendants within the District of Columbia. Paragraph (b) of the "long-arm" statute specifically requires that the asserted claim which is the subject matter of the litigation *must* arise from the same acts alleged to have been performed in the District and upon which jurisdiction is based. Thus, no personal jurisdiction lies where the only connection between the defendants and the District of Columbia is that they allegedly "do business". Furthermore, as alleged previously, the defendants conducted all business transactions, with respect to the BMW automobile involved herein, outside of the District of Columbia. Finally, the sale by Heischman BMW Inc. to Maryland National Bank, which in turn leased said vehicle to the aforenoted law firm, interrupted the stream of commerce.

As stated in *Meyers v. Smith*, 460 F.Supp. 621 (DDC 1978), the minimum contacts requirement of *International Shoe Company v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed 95 (1945), is premised upon "some act by which the defendant purposely avails himself of the privilege of conducting activities in the forum state invoking the benefits and protections of its laws," *Id* at 622, *quoting Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

The District of Columbia Court of Appeals emphasized the limitation on § 13-423(a)(1) as follows:

> However, under § 13-423(a)(1) and the doctrine of *International Shoe*, a finding that the defendant has "transacted business" in the District of Columbia does not result in unlimited jurisdiction. Instead, jurisdiction is limited to claims arising from the particular transaction of business which provides the basis for jurisdiction. D.C. Code 1973, § 13-423(b). In other words, the statute would not grant the Superior Court jurisdiction over a nonresident defendant with respect to a claim arising from a shipment of goods to a purchaser in Pennsylvania, solely on the ground that the defendant had also shipped goods to purchasers in the District. *Cohane v. Arpejo-Calif. Inc.*, 385 A.2d 153, 158 (DC. App. 1978) *cert. den.* 439 US. 980.

The court in *Bueno v. La Compania Peruana de Radiodifusion*, 375 A.2d 6 (DC App 1977), similarly stressed the due process considerations which require that the claim involved be premised upon the same activities on which jurisdiction is based. Factors emphasized by the Court in affirming a dismissal for lack of *in personam* jurisdiction included: 1) the defendant did not pursue or initiate contract negotiations in the District; 2) no services were to be provided in the forum state; 3) The only contact within the District was the delivery, by courier, of the contract involved, and later acceptance of payment.

A dismissal resulted in *Berwyn Fuel, Inc. v. Hogan*, 399 A.2d 79 (D.C.App. 1979), due to a lack of personal jurisdiction for the aforementioned reason. Although the defendant in *Berwyn* "transacted business" in the District of Columbia, by making fuel deliveries thereto, the accident on which the plaintiff's claim was based arose from an activity which occurred completely within Maryland(delivery of fuel by a truck which struck the plaintiff's automobile).

Similarly, in *Mosley v. Nationwide Purchasing, Inc.*, 488 F.2d 418 (D.C. Cir. 1973), the court affirmed the dismissal of an action against an Oregon corporation, Kuni Cadillac, because it was not transacting business within the District. The plaintiff/appellant, Mosley, a District of Columbia resident, delivered a purchase order for a Cadillac to the defendant Nationwide. Nationwide in turn ordered the Cadillac from Kuni, who delivered the vehicle to Nationwide in Detroit. Appellant Mosley traveled to Detroit and accepted delivery there. In affirming the dismissal, the court stated that Kuni was not solicited or paid by the appellant, it did not maintain an office or agent in the District, it exercised no control over the automobile after said vehicle was sold to Nationwide and that Nationwide did not become the agent of Kuni for purposes of jurisdiction.

Nor may jurisdiction be premised upon the plaintiff's own activities within the forum. The plaintiff/appellant in *Environmental Research Int'l v. Lockwood Greene Engineers, Inc.*, 355 A.2d 808 (DC. App. 1976), argued that its activities in representing the defendant, a foreign corporation, before the Environmental Protection Agency (EPA) were a sufficient basis on which to exercise personal jurisdiction over the appellee. The Court quoted *Hanson supra* at 253, "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of a contact with the forum state." *Environmental Research, supra* at 812. In affirming the dismissal for lack of personal jurisdiction, the court stated:

> Thus, a plaintiff cannot rely on its own activities, rather than those of a defendant, to establish the requisite minimal contacts for personal jurisdiction. The mere fact that a nonresident has retained the professional services of a District of Columbia firm, thereby setting into motion the resident party's own activities within this jurisdiction, does not constitute an invocation by the nonresident of the benefits and protections of the District's laws. *Id* at 812

The defendant/appellees in that case were incorporated under the laws of other states, were not authorized to do business in the District of Columbia, maintained no office, agent or employees in the District of Columbia, and did not perform or solicit their work therein. The appellant initiated the contact between it and the appellees (as in the case in the instant action), no negotiations were conducted in the District of Columbia, and no personnel were ever present in the area.

Similarly, this defendant and the defendant, BMWAG, did not solicit or initiate the leasing arrangement by the law firm of the deceased, did not assist in the conduct of negotiations nor in the later servicing of the vehicle in question, and maintained no offices, agents or employees here. Assuming *arguendo*, that this defendant and the defendant BMWAG, maintain sufficient contacts with the District of Columbia., the defendants nevertheless had no part in the sale or subsequent leasing of the vehicle involved herein. The defendant, BMWAG, exercised no control or ownership of any BMW once said automobiles left the Federal Republic of Germany, and this defendant did not solicit or transact any business in the District of Columbia, nor is Heischman or the Maryland National Bank, or any other dealer, or distributor, the agent of BMWAG or this defendant.

The Illinois state courts have developed a similar requirement, providing that sales within the state by independent businesses of products manufactured by a non-resident outside the state, are not a sufficient contact with Illinois to render the non-resident amenable to the court's jurisdiction under the "transaction of business" provision. *Wing v. Challenge Machinery Co.*, 23 FRD 669 (DC. Ill. 1959).

In the case at bar, assertion of jurisdiction over BMWNA, would be a denial of a due process and the traditional notions of fair play, the principles emphasized in

International Shoe, supra and *Hanson, supra.* As can be seen from the allegations of the complaint itself, neither BMWAG nor BMWNA actually sold, delivered or serviced the vehicle in question; neither corporation is qualified to do business in the District of Columbia, neither corporation has sufficient contacts in the District of Columbia to enable a court to assert jurisdiction over them, and there are no agents, distributors or dealers who act in such a capacity as to enable the assertion of such jurisdiction.

Accordingly, neither of the defendants BMWAG or BMWNA, are subject to the *in personam* jurisdiction of this Court.

II. Venue

The instant case is an action based on injuries resulting in death from an automobile collision which occurred in the State of Maryland. The plaintiff administrator is a resident of Maryland, with offices in the District of Columbia; all defendants are foreign corporations. Upon information and belief, the sale and subsequent leasing of the vehicle in question occurred in either the State of Maryland or the Commonwealth of Virginia but not in the District of Columbia. The decedent resided and worked within the District of Columbia.

The federal venue statute in question is embodied in § 1404(a) of Title 28 of the U. S. Code. In relevant part this statute provides:

> "For the convenience of the parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other district or division in which it might have been brought."

Title 28 U.S.C. § 1391(b) provides that in diversity actions, venue lies only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose. Neither the plaintiff nor the defendants reside in

the District of Columbia, and the cause of action upon which the claim herein is based arose in the State of Maryland and not the District of Columbia.

Although the origin of § 1404(a) of Title 28 of the US Code is in the doctrine of *forum non conveniens*, Congress intended by the enactment of this section, to allow an exercise of broader discretion of the Courts than would have been appropriate under the Common Law doctrine. *Norwood v. Kirkpatrick*, 394 US 29, 75 S.Ct 544, 99 L.Ed 789 (1955).

Motions to transfer venue are addressed to the sound discretion of the Court, *Nowell v. Dick*, 413 F.2d 1204 (5th Cir. 1969), guided by criteria delineated in *Gulf Oil Corporation v. Gilbert*, 330 US 501, 67 S.Ct. 839 91 L.Ed. 1044 (1947). The court in *Gulf*, described both public and private interests which must be considered. The private interest involved considerations of ease of access to proof, availability of compulsory process, the cost of attendance of witnesses, possibility of a view of the site in question, enforceability of a judgement, and all other problems that make trial of a case "easy, expeditious and inexpensive." *Id* at 508.

Factors of public interest include congested court dockets, the burden of jury duty on a community with no relation to the claim and finally, the "appropriateness in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a Court in some other forum untangle problems in conflict of laws and in law foreign to itself." *Id* at 508-509.

The latter factor, that of the application of foreign law, is an important consideration in the case at bar. As stated in *Pitts v. Woodward and Lothrop*, 327 A.2d 816, 817 (DC. App.1974), *cert. den*, 420 U.S. 911(1975).

> We cited with approval the concurring opinion of former Chief Judge Hood in *Shaw v. May Department*

> *Stores Co.*, D.C.App., 268 A.2d 607, 610-611 (1970); also *Walsh v. Crescent Hill Co.*, D.C.Mun.App., 134 A.2d 653 (1957), and *Nee v. Dillon*, 99 U.S.App.D.C. 332, 239 F.2d 953 (1956), in which the point was stressed that if the plaintiffs are residents of Maryland and their cause of action arose there and is governed by the law of that state, trial judges were fully warranted in dismissing such actions filed in a District of Columbia court.

The District of Columbia Courts follow the conflicts of law rule that prescribes that, in a wrongful death and survival action, the substantive law where the fatal injury occurred applies. *Lewis v. Reconstruction Finance Corporation*, 85 U.S.App.D.C. 339 (1949). *Bremier v. VWOA*, 340 F.Supp 949 (D.D.C. 1972); *Niosi v. Aiello*, 69 A.2d 57 (D.C.Mun.App. 1949).

In *Lewis, supra*, the court held that the Nebraska statute of limitations applied to a District of Columbia action. "We conclude that the limitation laid down by the law of the state where the fatal injuries occurred should govern, unless the public policy of the forum is clearly opposed." *Id* at 341.

Similarly, Maryland law determined who the beneficiaries of a wrongful death action could be on a claim premised upon an injury in Maryland, and brought in the District of Columbia. *Niosi, supra.*

Maryland products liability law was applied in *Bremier, supra.* The District of Columbia Court applied Maryland law to a case brought by residents of the District concerning an accident which occurred in Maryland. The court stated:

> However, where, as in the instant case, suit is brought in the District of Columbia for wrongful death, the local law is that the court will not look to plaintiffs'

> theory of liability to resolve the conflict of laws question, but will apply the law of the forum wherein the death or deaths occurred. *Id* at 951.

The complexities of interpreting Maryland law in the case at bar would be avoided by transferring this action to a Maryland District Court. This defendant respectfully submits that the difficulty encountered in *VWOA v. Young*, 272 Md. 201, 321 A.2d 737(1974), in which a District of Columbia Court was required to certify a question of law to the Maryland Court of Appeals, may be readily avoided by such a transfer.

A change of venue would contribute to the ease and reduction of expense in the conduct of the trial. Further, by a transfer of the instant action, needless congestion of the District of Columbia Court dockets could be avoided.

As stated by the Supreme Court in *Gulf Oil, supra* at 508, "(a)dministrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin."

Similarly, the Court in *Nee v. Dillon*, 99 US.App.D.C. 332, 334, 239 F.2d 953 (1956), stated:

> In matters of this kind, plaintiffs from other jurisdictions should normally resort to their own courts. The courts of the District of Columbia, burdened as they are, should not without good reason be asked to make inquiry concerning events happening outside their jurisdiction.

The concern with clearing the District of Columbia Court dockets of foreign actions was elaborated in *Dorati v. Dorati*, 342 A.2d 18 (DC.App. 1975):

> This court has emphasized in a recent series of cases that when plaintiffs are residents of a neighboring jurisdiction in which defendants are amenable to

> service, and the claim arose in and is governed by the law of that jurisdiction, the courts of the District of Columbia will generally decline to hear the case. *Id.* at 23.

The Supreme Court has stated that the plaintiff's choice of forum, may be questioned if it is not the most appropriate choice. As stated in *Gulf Oil, supra* at p. 506, "(T)he general venue statute . . . do(es) not add up to a declaration that the court must respect the choice of the plaintiff." The 9th Circuit has said:

> If the operative facts have not occurred within the forum of original selection and that forum has no particular interest in the parties or the subject matter, the plaintiff's choice is entitled only to minimal consideration. *Pitts, supra* at 817, *quoting Pacific Car and Foundry Co. v. Pence*, 403 F.2d 949, 954 (1968)

Furthermore, in an action in which the claim was dismissed on the ground of *forum non conveniens*, the court emphasized the importance of substantial contacts with the forum:

> (W)hen a suit has contacts with another jurisdiction far more substantial than those with the forum, and that jurisdiction is equally convenient to both parties, the suit should be heard there. When a plaintiff ignores a jurisdiction having substantial contacts with his case and which is not inconvenient for him, his choice of a forum elsewhere is outweighed by the forum court's interest in clearing its calendar of foreign actions. (Citations omitted.) *Carr v. Bio-Medical Applications of Washington, Inc.*, 366 A.2d 1089 1092 (DC.App. 1976), quoting *Dorati supra* at 23.

The court in *Carr* also de-emphasized the importance of travel in the courts surrounding the District of Columbia area:

> (T)he inconvenience to the parties and witnesses of long distance travel—the factor regarded as of major importance by federal circuits in other jurisdictions, is not the only ground for dismissing an action in the Superior Court. As the county seats in such adjacent areas as Arlington and Fairfax, Virginia, or Montgomery and Prince George's, Maryland, are all within a 20-mile radius of the District, travel problems pale into insignificance as compared to such factors as the public interest in reducing the volume of difficult cases on court calendars already overcrowded *Id.* at 1092, *quoting, Frost v. Peoples Drug Store, Inc.*, 327 A.2d 810, 814 (DC.App. 1974).

Despite the fact that the plaintiff in *Carr* resided in the District of Columbia, the court held that the public interest would best be served by a dismissal. The tortious conduct resulting in death occurred in Maryland (although the plaintiff actually died at his home in the District of Columbia after the failure of his kidney dialysis machine), the defendant physicians were licensed to practice in Maryland, and the owner of the treatment center was a Delaware Corporation qualified to do business in Maryland.

From the face of the pleadings, the only contact which the plaintiff administrator has with the District of Columbia is that he maintains an office here. Yet, in *Haynes v. Carr*, 379 A.2d 1178 (DC.App. 1977), the court stated that the fact that the appellee is employed in D.C. is not of "overriding significance". *Id.* at 1180. The action in *Haynes* was transferred to Maryland because the only contact with the District was the defendant's place of employment. Furthermore, the residence of an executor for the purposes of venue is his personal residence, not that of the deceased. *Leonard v. Wharton*, 268 F.Supp. 715 (Md. 1967), *appeal dismissed*, 396 F.2d 452 (1968), *cert den*, 393 U.S. 1028, *reh. den.* 393 U.S. 1112. In the case at bar, it is the residence of the plaintiff in Maryland which would determine

the location of sufficient contacts with the forum, not the fact that he is employed in the District of Columbia.

Thus where the plaintiff does not reside in the selected forum, nor does the matter in controversy arise in the selected forum, little weight must be given to the plaintiff's choice. *Delay and Daniels Inc. v. Allen M. Campbell Co,,* 71 FRD 308 (D.D.C. 1976). The burden of the moving party is less in a transfer action based on such facts. *General Instrument Corp. v. Mosleck Corp.,* 417 F.Supp. 821, 823, (D.Del. 1976).

A further factor which has prevented a transfer of venue in District of Columbia Courts is the time delay in bringing a motion to dismiss on the grounds of *forum non conveniens.* In *Deupree v. T. Le,* 402 A.2d 328 (DC.App.1979), the court held that a claim premised upon an automobile collision which occurred in Maryland could be heard in the District of Columbia because of an unwarranted delay in filing the motion to dismiss. Because a trial date had been set and extensive interrogatories answered, the court felt the need to maintain the action in D.C. outweighed the burden of deciding foreign litigation. In contrast, granting the motion in the case at bar will not cause needless delay or expense or constitute a waste of judicial resources.

Applying the principles to the facts of the instant case, it is readily seen that this is a case in which the court should, in the exercise of its sound discretion, transfer to the United States District Court for the District of Maryland. It is undisputed that the accident happened in Maryland, that the plaintiff administrator is a Maryland resident, and that none of the defendants herein are residents of, or transact any business in the District of Columbia. The documents and witnesses pertaining to the occurrence of the accident and the sale and subsequent leasing of the vehicle in question, are upon information and belief, located in the state of Maryland or the Commonwealth of Virginia. Evidence as to the roadway condition and surrounding

areas are located in Maryland. The only connection that the instant case appears to have with the District of Columbia is the fact that the decedent resided and practiced law in the District, and the plaintiff has an office there. This is certainly insufficient reason to deny a transfer of the case to a more proper forum.

Respectively Submitted,

Leonard L. Lipshultz

John Llewelyn Hone
Suite 108 Montgomery Ctr.
8630 Fenton Street
Silver Spring, Md. 20910
587-8500

APPENDIX O

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80 1012

DANIEL G. GROVE
Executor of the Estate
Of Stuart Stiller

Plaintiff

vs.

HEISHMAN BMW, INC., et al.

Defendants.

AFFIDAVIT IN SUPPORT OF BMW OF NORTH AMERICA, INC.'S MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE PERSON

HOWARD F. BRECKENRIDGE, being duly sworn deposes and says:

(1) I am the Secretary of the corporation BMW of North America, Inc. (hereinafter referred to as BMWNA) with offices in Montvale, New Jersey.

(2) BMWNA is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New Jersey.

(3) BMWNA is the importer and distributor of BMW automobiles, parts and accessories manufactured in the Federal Republic of Germany by the defendant BMWAG.

(4) All manufacturing and distribution activities are carried on outside of the District of Columbia. Title to automobiles manufactured in Germany passes to the defendant BMWNA in the Federal Republic of Germany. None of the automobiles shipped to the United States of America are received in the District of Columbia but are

received in a number of ports along the East, West and Gulf Coasts of the United States of America. Thereafter, said automobiles are distributed by BMWNA at the port of entry to area dealers. Title thereto is transferred to dealers when vehicles are delivered to the dealers' common carrier.

(5) Neither this defendant, nor the defendant Bayerische Motoren Werke AG (hereinafter referred to as BMWAG), does business in the District of Columbia, has never qualified to do business there, and has no office or place of business therein. Neither this defendant, nor the defendant BMWAG, has appointed an agent to accept service of process in the District of Columbia. Neither of said defendants have any personnel in the District of Columbia, and do not own or control any property, real or personal, tangible or intangible in the District. Neither BMWNA nor BMWAG maintain any inventory or telephone listing there, nor do said defendants solicit business in the District of Columbia. BMWAG does not maintain any bank account in the District of Columbia. BMWNA maintains a bank account at the Riggs National Bank in the District of Columbia entitled Washington Regional BMW Dealer Advertising Association BMW of North America, Inc., which contains funds supplied by the BMW Washington, D. C. area dealers for joint advertising in the metropolitan area. This account is supervised by BMWNA, rather than by the dealers, to insure that all participating area dealers receive equal treatment with regards to such advertising.

(6) Although BMWNA and BMWAG's products are sold in Maryland and Virginia at retail, such sales are made by retail dealers on their own behalf and for their own benefit and not on behalf of this defendant or the defendant BMWAG. Neither BMWNA or BMWAG have any dealers or contract with any dealers in the District of Columbia. All sales of BMW automobiles in Maryland or Virginia are made by BMW dealers on their own behalf.

Neither of said defendants derive revenue from the sale of BMW automobiles in the District of Columbia.

(7) Neither this defendant nor the defendant BMWAG perform any service or repair work in the District of Columbia, nor is any such work performed on behalf of either of said defendants.

(8) BMWNA did not sell the automobile involved in this litigation either to the plaintiff's decedent, or to the Maryland National Bank, nor to any other person or organization within the District of Columbia, but rather sold said automobile and delivered it to the defendant Heishman's common carrier in either the State of Maryland, Virginia or New York. The entire transaction in question took place outside of the District of Columbia.

/s/ Howard F. Breckenridge
Howard F. Breckenridge
Secretary

Subscribed and Sworn to before me this 24th day of July, 1980.

/s/ Sondra Atlas
Sondra Atlas
A Notary Public of New Jersey
(Seal) My Commission Expires May 9, 1982

APPENDIX P

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80 1012

DANIEL G. GROVE
Executor of the Estate of Stuart Stiller
2033 M Street, N.W.
Washington, D.C. 20036,

Plaintiff,

v.

HEISHMAN BMW, INC.
3154 Jefferson Davis Highway
Arlington, Virginia 22202,

BMW OF NORTH AMERICA, INC.
BMW Plaza
Montvale, New Jersey 07645,

BAYERISCHE MOTOREN WERKE AG.
BMW Haus
Petuelring 130
Postfach 40 02 40
D-8000 Munchen 40
Federal Republic of Germany,

LOHR & BROMKAMP GmbH.
Muehlheimer Strasse 163
Offenbach am Main
Federal Republic of Germany,

Defendants

MOTION TO DISMISS FOR WANT OF JURISDICTION OR IN THE ALTERNATIVE FOR CHANGE OF VENUE.

Comes now the defendant Bayerische Motoren Werke, AG., (hereinafter referred to as BMWAG) by and through

Lipshultz and Hone, Chartered, Leonard L. Lipshultz and John Llewellyn Hone and moves this Honorable Court for an order dismissing the complaint against this defendant, for want of *in personam* jurisdiction or, in the alternative, to change the venue for this litigation, and for reasons therefor states as follows:

1) The plaintiff, who is a resident of the state of Maryland, has brought suit against the defendant, BMWAG, for injuries resulting in death sustained in an automobile accident which occurred in the state of Maryland. The plaintiff alleges, *inter alia,* that said death was caused by a defect in a 1978 BMW 530i manufactured by this defendant and sold by it and defendant BMW of North America, Inc., (hereinafter referred to as BMWNA).

2) This defendant is a business affiliation similar in nature to a corporation and is organized under the laws of the Federal Republic of Germany.

3) The Defendant BMWNA is a corporation established under the laws of the State of Delaware, with its principal place of business in the State of New Jersey.

4) The plaintiff has not alleged, and this defendant denies that any acts of the defendant relevant to this litigation occurred within the District of Columbia, nor are the defendants, BMWNA or BMWAG, engaged in business in the District. Neither defendant is engaged in activities which establish sufficient contacts with the District of Columbia to warrant the assertion of jurisdiction thereover.

5) The cause of action complained of arose in the State of Maryland, and therefore, Maryland substantive law applies. Further, there is no proper allegation that venue lies in the District of Columbia.

6) Upon the face of the pleadings, it appears that the BMW automobile involved herein was sold by a Virginia corporation, Heischman's BMW Inc., to a Maryland Cor-

poration, Maryland National Bank, which leased said automobile to the law firm of Stiller, Adler, Schwartz, and Kaswell, P.C. Upon information and belief, each such transaction occurred in the State of Maryland or the Commonwealth of Virginia, but not in the District of Columbia.

7) Such other and further grounds as may be advanced upon a hearing of this motion.

WHEREFORE, the defendant requests that this Court enter an Order granting the defendant's Motion To Dismiss For Want of Jurisdiction or in the Alternative for Change of Venue.

LIPSHULTZ AND HONE, CHARTERED

Leonard L. Lipshultz

John Llewellyn Hone
Suite 108 Montgomery Center
8630 Fenton Street
Silver Spring, Maryland 20910
587-8500

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion To Dismiss For Want of Jurisdiction Or In The Alternative For Change of Venue, Memorandum of Points and Authorities In Support of Defendant's Motion To Dismiss For Want of Jurisdiction and the unexecuted Affidavit of Jost J. Schmitt was mailed, postage prepaid this —— day of ———, 1980 to Paul Martin Wolfe, Esq., Hill Building, Washington, D.C. 20006, attorney for Plaintiff Grove, John Jude O'Donnell, Esq., 810 American Security Building 730 15th Street, N.W., Washington, D.C. 20005, attorney for Defendant Heishman, BMW, Inc., and to Daniel Bukovac, Esq., 1850 K. Street, N.W., Washington, D.C. 20006, attorney for Defendant Lohr & Bromkamp GmbH.

Leonard L. Lipshultz

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80 1012

DANIEL G. GROVE
Executor of the Estate Of Stuart Stiller
Plaintiff

vs.

HEISHMAN BMW, Inc., et.al.
Defendants

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION OR IN THE ALTERNATIVE FOR CHANGE OF VENUE

This defendant adopts the Memorandum of Points and Authorities In Support of Defendant's Motion to Dismiss For Want of Jurisdiction Or In The Alternative For Lack of Venue in support of this Motion filed by Defendant BMW of North America Inc.

LIPSHULTZ AND HONE, CHARTERED

Leonard L. Lipshultz

John Llewellyn Hone
Suite 108
Montgomery Center
8360 Fenton Street
Silver Spring, Maryland 20910
587-8500

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80 1012

DANIEL G. GROVE
Executor of the Estate Of Stuart Stiller
Plaintiff

vs.

HEISHMAN BMW, INC., et.al
Defendants

AFFIDAVIT IN SUPPORT OF BAYERISCHE MOTOREN WERKE AG'S MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE PERSON

Jost J. Schmitt being duly sworn deposes and says:

(1) I am a citizen of the Federal Republic of Germany and an attorney employed by Bayerische Motoren Werke, AG, (hereinafter referred to as BMWAG) with offices in Munchen, Federal Republic of Germany.

(2) BMWAG is a business affiliation similar to a corporation organized under the laws of the Federal Republic of Germany, with its principal place of business in Munchen, Federal Republic of Germany.

(3) BMWAG is the manufacturer of BMW automobiles which are manufactured in the Federal Republic of Germany.

(4) All manufacturing and distribution activities are carried on outside of the United States. Title to automobiles manufactured in Germany passes to the defendant BMWNA in Germany. None of the automobiles received in the United States of America are shipped to the District of Columbia but are shipped to a number of ports

along the east and west coasts of the United States of America, thereafter, said automobiles are distributed by defendant BMWNA at the port of entry to area dealers. Title thereto is transferred to dealers at the point of entry.

(5) This defendant does not do any business in the District of Columbia, has never qualified to do business there, and has no office or place of business therein. This defendant, has not appointed an agent to accept service of process in the District of Columbia, or has any personnel in the District of Columbia. It does not own or control any property, real or personal, tangible or intangible in the District, nor does it maintain any bank account, inventory, or telephone listing there, nor does it solicit business in the District of Columbia.

(6) Although BMWAG's products are sold in Maryland and Virginia at retail, such sales are made by retail dealers on their own behalf and for their own benefit and not on behalf of this defendant. This defendant does not have any dealers in the District of Columbia. All sales of BMW automobiles in Maryland or Virginia are made by BMW dealers on their own behalf. This defendant does not derive revenue from the sale of BMW automobiles in the District of Columbia.

(7) This defendant does not perform any services or repair work in the District of Columbia, nor is any such work performed on behalf of said defendant.

(8) BMWAG did not sell the automobile involved in this litigation either to the plaintiff's decedent, or to the Maryland National Bank, nor to any other person or organization, but was sold to defendant, BMWNA in the Federal Republic of Germany.

Jost J. Schmitt

SUBSCRIBED AND SWORN to before me this —— day of June 1980.

Notary Public

My Commission Expires:

APPENDIX R

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1012

DANIEL G. GROVE,
Executor of the Estate of Stuart Stiller,
Plaintiff,

v.

HEISHMAN BMW, INC.; BMW OF NORTH AMERICA, INC.; BAYERISCHE MOTOREN WERKE AG.; and LOHR & BROMKAMP GmbH.

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS OF DEFENDANT LOHR & BROMKAMP GmbH.

Hermann Marten being duly sworn, deposes and says:

1. I am the Managing Director ("Geschäftsführer") of Lohr & Bromkamp GmbH ("Lobro"), a defendant in this action, and make this affidavit in support of Lobro's motion to dismiss for lack of jurisdiction over its person.

2. I have been Managing Director of Lobro since 1974, and have held various other positions with the Company since joining it in 1953. In my present position, I am generally responsible for all Company affairs, including the sales and distribution of all Lobro's products. I make this affidavit based on personal knowledge gained during my tenure at Lobro.

3. Lobro is a corporation organized under the laws of the Federal Republic of Germany, with its sole place of business in Offenbach am Main, Federal Republic of Germany.

4. Lobro does not have and has never had an office or other place of business anywhere in the United States of America.

5. Lobro does not have and has never had any employees in the United States.

6. Lobro does not and has never owned, possessed, used or had an interest in any real property in the United States, nor does it have any other assets of any kind there.

7. Lobro does not and has never transacted any business, nor contracted to supply or perform any character of work or services, anywhere in the United States.

8. Lobro has never contracted to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the United States.

9. Lobro is completely independent from and has absolutely no control over any of the activities of Bayerische Motoren Werke AG ("BMW") or any of the other defendants in this action; neither BMW nor any of the other defendants perform any activities on behalf of Lobro or act as agents for Lobro.

10. Lobro manufactures all of its products at its plants located at Offenbach am Main, Federal Republic of Germany. Lobro's principal products are constant velocity joints for use in automobiles with independant suspension.

11. Lobro sells virtually all of its products directly to automobile manufacturers located in the Federal Republic of Germany or elsewhere in Europe, including BMW. Lobro does not and has never sold its products to any automobile manufacturers located in the United States.

12. All of Lobro's sales to BMW take place in the Federal Republic of Germany and are final. Lobro relinquishes title and all control of its products when it delivers those prod-

ucts to BMW. Such sales are governed by the laws of Germany.

13. Lobro has no control over the method of installation of its products into automobiles by BMW or any other manufacturers or over the selection of those types or models of automobiles into which its products are installed. Lobro has no control over the sales, distribution or exportation from the Federal Republic of Germany of automobiles into which its products are installed, nor over the subsequent servicing of such automobiles.

14. Lobro's constant velocity joints are sold to BMW and other European automobile manufacturers at prices ranging from approximately DM 56 to DM 72 (roughly $33-$42.50 at an exchange rate of 1.7 DM per Dollar) and thus represent a minor fraction (well under 1%) of the selling price of a BMW automobile.

15. I am unable to quantify exactly the amount of revenue Lobro derives from sales of its products to BMW and other European manufacturers which are incorporated in automobiles which such manufacturers eventually might export to the United States. However, based on information obtained from automobile manufacturers as to the approximate percentage of their production which each exports to the United States, I would estimate that Lobro's total annual revenue from such sales would not exceed DM 24 million (roughly $14 million). That would represent less than 10% of Lobro's annual sales of approximately DM 300 million. I am unable to estimate the amount of revenue which Lobro possibly could be considered to derive indirectly as the result of the eventual use in either Maryland or the District of Columbia of BMW or other automobiles containing its products, but it surely would be a small amount.

16. Lobro employs no salesmen or sales agents anywhere in the United States and does not actively solicit any busi-

ness there. It does receive orders on an irregular basis from certain independent distributors of automobile parts located in the United States. All sales made in response to such orders, are made FOB German ports, with title passing to the purchaser in Germany. To the best of my knowledge, no such shipments are made to purchasers located in either Maryland or the District of Columbia. Lobro has no information as to the subsequent distribution of its products by such purchasers, and I do not know whether any of these products eventually find their way into either Maryland or the District of Columbia. The total volume of Lobro's export sales to the United States purchasers in any year would not exceed DM 5 million, or less than 2% of Lobro's total sales.

17. Lobro has never been a party in any administrative or judicial proceeding in the United States. While I am aware that a limited percentage of our products eventually may find their way to the United States, as indicated above, Lobro carries on no activity whatsoever there and, to the best of my knowledge, it does not avail itself of any of the privileges or benefits of United States law. I quite frankly had never expected that Lobro, which conducts all of its business and makes all of its sales in Germany, could be called into court in the United States.

/s/ HERMANN MARTEN
Hermann Marten

Sworn to before me this 28th day of July, 1980

/s/ BARBARA T. WILSON
Notary Public

APPENDIX S

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1012
(Green, J.)

DANIEL G. GROVE,
Executor of the Estate of Stuart Stiller
Plaintiff,

v.

HEISHMAN BMW, INC.
BMW OF NORTH AMERICA, INC.
BAYERISCHE MOTOREN WERKE AG.
LOHR & BROMKAMP GmbH.
Defendants.

AFFIDAVIT OF ROBERT M. ADLER

ROBERT M. ADLER, being duly sworn, deposes and says:

1. I am an attorney with the law firm Stiller, Adler, Schwartz & Kaswell, P.C., Suite 720, 1825 K Street, N.W., Washington, D.C. 20006. This law firm was started in June, 1974, by Stuart Stiller, Lawrence H. Schwartz and myself and I worked with Stuart Stiller from that time until his death on August 4, 1979.

2. In the summer of 1978, our law firm, then Stiller, Adler & Schwartz, P.C., leased three BMW automobiles for my use and the use of my partners, Stuart Stiller and Larry Schwartz. I am familiar with the circumstances surrounding the sale and lease of those automoblies.

3. Each of the three automobiles leased by the firm was supplied by Heishman BMW, Inc., and all of our negotiations were conducted with Truman Morrison, III, who was employed as a part-time retail car salesman with Heish-

man. Morrison was then employed on a full-time basis as an attorney with the Public Defender Service, and he is now a Judge of the Superior Court of the District of Columbia.

4. In July 1978, I suggested to Stuart Stiller that the firm buy or lease BMWs for our use. Stiller agreed and we promptly telephoned Truman Morrison at the Public Defender Service in the District to indicate our interest. This was our first conversation with Morrison or anyone connected with Heishman about our firm's buying or leasing BMWs. Stuart Stiller and I were on the speaker phone in his office. We told Morrison that we wanted to buy or lease 2 or 3 BMWs, and asked him what kind of a deal he could put together on such a volume transaction. We discussed the possible deal in general terms that day, and Morrison gave us some rough figures either that afternoon or the next day by a telephone call to our office.

5. On the basis of the rough figures Morrison provided, Stuart Stiller, Larry Schwartz and I decided that the firm would proceed to lease three cars. We then met with Morrison in Stuart Stiller's office at the firm to discuss models, options and prices in more detail. Stuart Stiller, Larry Schwartz, Truman Morrison and I were all present at the meeting, which lasted approximately one hour. Morrison had brought catalogs showing the various models, options and color samples. We discussed how various options (such as magnesium wheels) would possibly affect the resale price of the car. In discussing the stereo system options, Morrison stated at this meeting that he would supply, without charge, the cassette tape decks. At the conclusion of this meeting, we had made a firm decision to lease three cars, and we so informed Morrison.

6. Immediately after this meeting, Truman Morrison drove Larry Schwartz out to Heishman to enable Larry to test drive a car and review options. I test drove a BMW

that evening at VOB Datsun in Maryland. I do not know whether Stuart Stiller ever test drove a car.

7. After the meeting in Stuart Stiller's office, we had several additional telephone conversations with Truman Morrison to finalize the terms of the leases. On each occasion the call was between our offices in the District and his office at the Public Defender Service in the District. We never called Morrison at Heishman.

8. In sum, all of our negotiations over the terms of the sale and lease of the cars took place in the District of Columbia. None of our negotiations occurred in Virginia or Maryland.

9. All three cars were financed by the Maryland National Bank. We did not negotiate the terms of the lease with the Bank, however. The entire financing package was put together by Heishman, and our negotiations were with Heishman.

10. Truman Morrison notified us by telephone calls to our offices in the District when the three cars were ready for delivery. Larry Schwartz and I picked our cars up at Heishman, and signed the necessary papers connected with the lease of the cars at that time. I do not know whether Stuart Stiller picked his car up at Heishman, or whether it was delivered to him in the District.

11. The invoices for each of the three cars leased by the firm indicate that a District of Columbia sales tax was charged. Each of the three cars was registered in the District of Columbia, and Heishman did all the work necessary to secure District of Columbia tags for the cars.

12. Stuart Stiller lived and worked in the District of Columbia, and he used his car principally in the District of Columbia.

13. I understand that this Affidavit will be submitted by Daniel G. Grove, Executor of the Estate of Stuart Stiller,

in support of his opposition to a motion by two of the defendants to dismiss the case for lack of jurisdiction or transfer it to the District of Maryland.

Robert M. Adler

Subscribed and sworn to before me this —— day of July, 1980.

Notary Public
My Commission Expires:
My Commission Expires April 30, 1985

APPENDIX T

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1012
(Green, J.)

DANIEL G. GROVE,
Executor of the Estate of Stuart Stiller
Plaintiff,

v.

HEISHMAN BMW, INC.
BMW OF NORTH AMERICA, INC.
BAYERISCHE MOTOREN WERKE AG.
LOHR & BROMKAMP GmbH.
Defendants.

ANSWERS TO INTERROGATORIES

1. State the name, address, date of birth, occupation of the person answering these interrogatories.

ANSWER:

Daniel G. Grove, 2033 M Street N.W., Washington D.C., 20036; born April 24, 1940; attorney-at-law.

* * *

7. Identify and describe in detail the roadway where the occurrence took place, and include:

a) the exact location where the occurrence took place by reference to road names, intersections, curbs, and other landmarks;

b) the number of lanes of travel;

c) the roadway and shoulder surface;

d) the speed limit;

e) all relevant traffic control devices;

f) the condition of the road with respect to whether it is straight, curved, winding, uphill, etc.;

g) the width of the road at the scene of the occurrence.

ANSWER:

a) The accident occurred on Wisconsin Avenue in Bethesda, MD, near the intersection of Wisconsin Avenue and DeRussey Parkway. The car began to swerve just south of the intersection, and collided with a tree on the right side of Wisconsin Avenue at a point opposite where DeRussey Parkway intersects with Wisconsin Avenue.

b) There were three lanes of travel in the north-bound direction of Wisconsin Avenue at the location of the accident.

c) The surface of the roadway was asphalt, and the surface to the right of the roadway was dirt and grass.

d) The speed limit was 35 mph.

e) None.

f) Straight and grade.

g) The road was three lanes wide.

* * *

11. State with respect to the occurrence in question, the speed at which the deceased was traveling before impact, and at the moment of impact, and how said knowledge was obtained. If through a witness, state the full name and present address of said individual.

ANSWER:

The deceased was travelling at approximately 25 to 30 m.p.h. when the car began to swerve. His speed at the moment of impact was approximately the same. This knowl-

edge was obtained from an eyewitness, Barbara Butler, whose present address is 4205 South Atlantic Avenue, Daytona Beach, Florida 32019.

* * *

19. With respect to the ownership of the subject vehicle, state:

a) the name and address of the owner and of any prior owners;

b) the present owners relationship to the deceased;

c) from whom the vehicle was purchased or leased;

d) the salesman with whom all purchase arrangements were made;

e) the purchase or leasing price;

f) the means and source of payment for said vehicle;

g) how many miles the vehicle had been driven when such owner acquired title and at the time of the occurrence at issue.

ANSWER:

a) At the time of the accident, the automobile was owned by Maryland National Bank, 6192 Oxon Hill Road, Oxon Hill, MD 20021, and leased to Stiller, Adler and Schwartz, P.C. As executor of Stuart Stiller's estate, I am the present owner of the vehicle.

b) I am the executor of Stuart Stiller's estate.

c) The vehicle was purchased from defendant Heishman.

d) All purchase and lease arrangements were made with a Heishman salesman, Truman Morrison III.

e) The purchase price was $16,539.

f) Stiller, Adler and Schwartz, P.C. made the lease payments on the vehicle.

g) The vehicle was new when it was purchased by the Maryland National Bank and leased to Stiller, Adler and Schwartz. It had approximately 11,400 miles on it at the time of the accident.

* * *

26. State the name and address of all persons who were at the scene or arrived there within one hour following the occurrence, including all eyewitnesses to the occurrence.

ANSWER:

1. Barbara Butler, address stated above.

2. Dr. Osoth Lekagul, 7425 Arlington Road, Bethesda Maryland.

3. Sgt. Vayer, Bethesda-Chevy Chase Rescue Squad.

4. Sgt. Cole, Bethesda-Chevy Chase Rescue Squad.

5. Officer Michael Trautner, Montgomery County Police Department.

27. State the name and address of all persons who investigated the occurrence on your behalf.

ANSWER:

1. Robert Brenner, 6400 Goldsboro Road, Washington, D.C. 20034

2. Robert V. Pautsch, P.O.Box 66, Grosse Ile., Michigan 48138.

3. Karl Dehn, 15835 Fields Road, Rockville, MD.

* * *

40. State the names, addresses and telephone numbers of each and every person who inspected said vehicle at the

scene of the occurrence or afterwards at any place of storage.

ANSWER:

The examination of the automobile on December 3, 1979, was conducted by Dr. Brenner, Mr. Pautsch and Mr. Dehn. On August 7, 1979, the automobile was examined by Officer Michael W. Troutner, Montgomery County Police, Sgt. L. Wilt of the Maryland State Police, and another Maryland State Police Officer whose name is unknown. Dr. Brenner was present during that examination.

41. If the automobile involved in the occurrence was towed from the scene, state the following:

a) where said vehicle was taken;

b) the name, address or other identity of each tow truck operator and tow truck owner in any way involved in the retrieval, hooking up and towing of said vehicle.

ANSWER:

The automobile was towed from the scene by James Fried of Dale's Sunoco. It was towed to Dale's Sunoco, 7824 Wisconsin Avenue, Bethesda, MD, where it remained until August 6, 1979.

42. State the name, address and telephone number of each and every person who took, has taken, or who has ever had possession of any part whatsoever from said vehicle, whether to do repair work, make alterations, conduct tests, or in the wrecking or junking of the vehicle, or a resale of the vehicle, or for the purpose of this litigation, and identify precisely the particular parts.

ANSWER:

From the time of its purchase until the date of the accident, the automobile was in the posession of Stuart

Stiller. It was in the possession of defendant Heishman for repairs on numberous occasions, as described above. After the accident, it has been in the possession of Dale's Sunoco, the Montgomery County Police, and Dehn's Auto Repair. Parts are now in the possession of my attorney.

* * *

/s/ DANIEL G. GROVE
Daniel G. Grove

Subscribed and sworn to before me this 3rd day of November, 1980.

/s/ RACHEL L. STEUART
Notary Public
My Commission expires: 8/14/83

APPENDIX U

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Number: 80-1012

DANIEL G. GROVE
Executor of the Estate of
Stuart Stiller

Plaintiff

vs.

HEISHMAN BMW, INC.
BMW OF NORTH AMERICA, INC.
BAYERISCHE MOTOREN WERKE AG,
LOHR & BROMKAMP GmbH

Defendants

OPPOSITION OF THE DEFENDANTS, BMW OF NORTH AMERICA, INC., AND BAYERISCHE MOTOREN WERKE AG, TO PLAINTIFF'S MOTION FOR RECONSIDERATION

Comes now the defendants, BMW of North America, Inc. and Bayerische Motoren Werke AG (hereinafter referred to respectfully as BMWNA and BMWAG) by their counsel, Leonard L. Lipshultz, John Llewellyn Hone and Lipshultz and Hone, Chartered, and opposes the Plaintiff's Motion for Reconsideration, and as reasons therefore states:

1. That this action initially should have been brought in Maryland as shown by the pleadings presently filed with this Court.

2. That the Memorandum Opinion of this Court, dated February 27, 1981, was the result of the Motion of the defendants, BMWNA and BMWAG and Lohr and Bromkamp GmbH (Lohr), for reconsideration of the Order of the Court denying the Motions to Dismiss, or in the Alternative, to Transfer the action to the District of Maryland.

Said Motions were properly before the Court as discussed during the status calls on September 17, 1980, and November 13, 1980.

3. That the February 27, 1981, Memorandum Opinion recognized the propriety of transfer and the obvious need to advance this litigation beyond jurisdictional issues.

4. That substitution of an executor residing in the District of Columbia at this stage of the proceedings is inappropriate.

5. That this Court should not reconsider its decision of February 27, 1981, based on actions which the plaintiff has failed to perform.

6. That it is unnecessary to delete any portions of the February 27, 1981, Memorandum Order.

WHEREFORE, defendants, BMWNA and BMWAG respectfully request this Honorable Court to deny the plaintiff's Motion for Reconsideration.

Respectfully submitted

Leonard L. Lipshultz

John Llewellyn Hone
Suite 108-Montgomery Center
8630 Fenton Street
Silver Spring, Maryland 20910
587-8500
Attorneys for BMW of North America, Inc.
and Bayerische Motoren Werke AG

CERTIFICATE OF SERVICE

I Hereby Certify that a copy of the foregoing Opposition of the Defendants, BMW of North America, Inc. and Bayerische Motoren Werke AG, to Plaintiff's Motion for Reconsideration along with Points and Authorities in Support thereof, were mailed, postage prepaid, this 20th day of March, 1981 to Paul Martin Wolfe, Esquire, Hill Building, Washington, D. C. 20006, Attorney for Plaintiff; John Jude O'Donnell, Esquire, 810 American Security Building, 730 15th Street, N. W., Washington, D. C. 20005, Attorney for Defendant Heishman BMW and to Daniel Bukovac, Esquire, 1850 K Street, N. W., Washington, D. C. 20006, Attorney for Defendant Lohr & Bromkamp GmbH.

John Llewellyn Hone

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Number: 80-1012

DANIEL G. GROVE
Executor of the Estate of
Stuart Stiller

Plaintiff

vs.

HEISHMAN BMW, INC.
BMW OF NORTH AMERICA, INC.,
BAYERISCHE MOTOREN WERKE AG,
LOHR & BROMKAMP GmbH

Defendants

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DEFENDANTS' BMW OF NORTH AMERICA AND BAYERISCHE MOTOREN WERKE AG OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

The United States District Court for the District of Maryland Is the Proper Forum of the Instant Action.

Section 1391 of Title 28 of the United States Code defines the appropriate forum for this case. That statute provides in pertinent part:

> (a) a civil action wherein jurisdiction is founded only on diversity of citizenship may . . . be brought only in the judicial district where all the plaintiffs or all the defendants reside or in which the claim arose. 28 U.S.C. 1391 (a).

Here the plaintiff is a resident of Maryland as an executor's domicile is his residence for purposes of venue. *Leonard v. Wharton*, 268 F.Supp 715 (D.Md.1968), *appeal dismissed*, 396 F.2d 452, *cert. den.*, 393 U.S. 1028 (1969).

Also, Bayerische Motoren Werke AG and BMW of North America, Inc. (hereinafter referred to respectfully as BMWAG and BMWNA) are not residents of the District of Columbia because neither of the BMW defendants is incorporated, licensed to do business or actually is doing business within the District of Columbia. See, 28 U.S.C. 1391 (c). Affidavit of Howard Breckenridge in Support of BMWNA's Motion to Dismiss for Lack of Jurisdiction Over the Person, and Affidavit of Jost J. Schmitt in Support of BMWAG's Motion to Dismiss for Lack of Jurisdiction Over the Person.

Defendants Lohr and Bromkamp GmbH (hereinafter Lohr) and Heishman BMW, Inc. (hereinafter Heishman) are likewise not incorporated or licensed to do business within the District of Columbia. See Affidavit of Hermann Marten in Support of Motion to Dismiss of Defendant Lohr and Bromkamp GmbH. Heishman's contact with the District was, in this case, fortuitous since Heishman actually sold the car which is the subject of this lawsuit to a Maryland corporation, and in any event, Heishman has expressed no objection to the transfer of this action.

Thus, since plaintiff is a resident of the State of Maryland and none of the defendants are residents of the District of Columbia, venue is improper under 28 U.S.C. § 1391 (a). The only proper forum remaining under § 1391 is the forum ". . . in which the claim arose." 28 U.S.C. 1391 (c). Since Maryland is the place of the alleged wrong, that is, the place of the injury and subsequent death, Maryland is the appropriate forum. *Lamont v. Haig,* 590 F.2d 1124 (D.C. Cir. 1978).

The Court is also referred to this defendant's previous Memorandum of Law in support of their Motions contesting the Court's jurisdiction which are incorporated by reference.

The Motion of the Defendants Was Properly Before This Court When the Court Issued Its February 27, 1981, Memorandum Opinion.

The defendants, BMWAG and BMWNA first moved this Court to dismiss for want of jurisdiction, or alternatively, for a change of venue, on June 17, 1980. The Court denied those Motions on July 23, 1980, and on August 1, 1980, both BMW defendants moved for a reconsideration of that Order. After a reconsideration was denied, defendant Lohr and Bromkamp GmbH (Lohr) on September 2, 1980, moved to dismiss for lack of personal jurisdiction. After Lohr's Motion was denied on September 8, 1980, three significant events occurred: BMWAG and BMWNA filed a Motion for Leave to Appeal the Orders of July 22, 1980 and August 11, 1980, Lohr filed a Motion to Certify the Order of September 8, 1980, and a status call was held on November 13, 1980.

At the September 8, 1980, status call the Honorable Judge June L. Green deemed the Motion of the defendants to certify to be a Motion for Reconsideration. This fact is evidenced by the following colloquy between plaintiff's counsel and the Court during the November 13, 1980 status call:

THE COURT: We have before us the Motion to Reconsider denial of transfer.

Would you like to address that at this time? I don't think you have responded to it.

MR. BAINE: Thank you, Your Honor.

We did file a memorandum on September 29. It's entitled "Memorandum in Opposition to Motions of all the Defendants to Certify."

There was, the last time we were before you, some question about a motion for reconsideration and you deemed a reply memorandum that had been filed to constitute a

motion to consider. (Transcript of November 13, 1980 status call, page 2).

The pendency of the Motion to Reconsider is further shown by the acceptance of the Court with the following statement by counsel for the BMW defendants:

MR. HONE: Your Honor, may I make one last statement?

Mr. Baine indicated the defendant BMW was not here on the motion for reconsideration.

It's my understanding, at the time of the last status call, the Court concluded to treat the defendants BMW's motions for leave to appeal and [sic] interlocutory order as a motion for reconsideration and it is on that basis that the defendants BMW were rearguing its position as to jurisdiction and venue.

THE COURT: All right. (Transcript of November 13, 1980, status call, page 29).

Thus plaintiff's counsel in his Motion for Reconsideration misstates the rulings of this Court and misconstrues the pleading of the BMW defendants. The appropriateness of the memorandum opinion is clear since the motion for certification was treated by the Court as a motion for reconsideration.

Plaintiff's Motion for Reconsideration Should Be Denied Because Further Delay of This Trial Is Unwarranted.

As the above discussion demonstrates, the jurisdiction of this Court has been under constant and vigorous attack since suit was commenced in the instant action by the filing of the Complaint on April 22, 1980.

With the plaintiff's filing of his Motion for Reconsideration there have been a total of some twenty odd motions, oppositions, and orders addressed solely to the jurisdiction

or venue of this Court. Eleven months have now elapsed since the filing of the Complaint and still the questions of jurisdiction and venue linger although those issues have been fully briefed by all the parties. The Court's Memorandum Opinion of February 27, 1981, was a needed resolution of this issue so that this case could progress through discovery and, thereafter, to the merits. There is no justification for further delay.

Reconsideration Should Be Denied Because Plaintiff Has Failed to Perform Any of the Acts Which It Alleges Will Cure the Deficiencies in Jurisdiction and Venue.

Plaintiff states in his Motion for Reconsideration that he is prepared to dismiss Lohr as a party and to substitute a District of Columbia resident as an executor to cure the jurisdictional defects in his case. Initially, it must be observed that plaintiff has not attempted to substitute a District of Columbia executor and this Court should not reconsider its ruling based upon a nonexistent *in futuro* action. Furthermore, a substitution of the parties is permissible under Federal Rules of Civil Procedure, Rule 25 only in cases of death, imcompetency, or a transfer of interest.

It is clear, as the Court stated in *Oster v. Rubenstein*, 136 F.Supp. 733 (S.D.N.Y. 1955), that where federal jurisdiction has not properly been established, the defect may not be cured by a substitution of parties as plaintiff suggests. Thus, proper jurisdiction must be established at the inception of the suit and may not be remedied by the substitution of executors.

Plaintiff also states that by dismissing Lohr as a defendant any defects in venue can be cured. However, in footnote four of plaintiff's Motion, the reason why Lohr must not be dismissed becomes apparent. In footnote four plaintiff alleges:

> ". . . the immediate cause of the fatal accident in this case was the failure of the constant velocity joint manufactured by Lohr . . ."

Plaintiff then concludes that his investigation reveals that BMWAG and Heishman were responsible for the failure. By the very fact that plaintiff alleges a defect in the constant velocity joint, plaintiff has demonstrated the necessity of Lohr as a party to this action both for purposes of discovery and possible cross-claims by BMWAG and BMWNA.

The only cases the plaintiff has cited as support for his theory that Lohr should be dismissed are cases dealing with the appropriateness of a change of venue ". . . where facts that bear on that issue have not yet been the subject of discovery." (Plaintiff's Memorandum of Points and Authorities in Support of the Motion for Reconsideration, page 7). But, the plaintiff has not taken any formal discovery of BMWAG, BMWNA, Heishman or Lohr in the eleven months since the filing of the Complaint in this case. Therefore, even assuming *arguendo* that there are facts which bear on the appropriateness of venue in this Court—a proposition that these defendants deny—the failure to present those facts to this Court is the fault of the plaintiff for his lack of taking formal discovery.

The Affidavits Filed in This Case and Statements by the Plaintiff Demonstrate That This Case Initially Should Have Been Brought in the United States District Court for the District of Maryland.

The Affidavits of Howard Breckenridge, Jost J. Schmitt and Hermann Marten, *supra,* Part I of this Memorandum, clearly show that BMWAG, BMWNA and Lohr are not residents of the District of Columbia. Also, the executor is a resident of Maryland. *Leonard v. Wharton, supra.* Thus, plaintiff seeks to overcome the transfer of this action by the assertion that the defendant Heishman is not amen-

able to jurisdiction in Maryland. Memorandum of Points and Authorities in Support of Plaintiff's Motion for Reconsideration, p. 9. However, plaintiff's assertion is misplaced.

The long arm statute in Maryland, Maryland Code Annotated, Courts and Judicial Proceedings § 6-103, provides three bases for asserting jurisdiction over Heishman. Section 6-103 (b) provides:

> In general—A Court may exercise personal jurisdiction over a person who directly or by an agent:
>
> 1) transacts any business or performs any character of work or service in the State;
>
> 2) contracts to supply goods, food, services, or manufactured products in the State; [or]
>
> 4) causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State.

Whether Heishman maintains minimum contacts within the State of Maryland to constitute doing business within Maryland under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and Section 6—103 (b)(1) above will be determined if the plaintiff seeks discovery from Heishman. Even if plaintiff takes no discovery of Heishman, however, Heishman is amenable to jurisdiction in Maryland under Section 6-103 (b)(2) or 6-103 (b)(4).

Section 6-103 (b)(2) of the Court and Judicial Proceedings Article of the Annotated Code of Maryland confers jurisdiction over any person contracting to supply goods in Maryland. Plaintiff's Complaint in paragraph five alleges that "Heishman sold the BMW automobile driven

by the deceased at the time of the fatal accident to the Maryland National Bank . . ." This allegation is sufficient to subject Heishman to jurisdiction in Maryland as the Court of Appeals in Maryland stated in *Harris v. Arlen Properties, Inc.* 256 Md 185, 260 A.2d 22 (1969) that transacting business within the State may be shown by a purposeful act performed by a party in the State with respect to a contract even though the last act marking the formal execution of the contract may not have occurred within the State.

Jurisdiction over Heishman may also be proper under Section 6-103 (b)(4) because the alleged incident occurred within the State of Maryland due to alleged negligent servicing by Heishman in Virginia (Complaint, paragraph 21, and footnote four in plaintiff's Memorandum of Points and Authorities in Support of the Motion for Reconsideration). The Court in *McLaughlin v. Copeland,* 435 F.Supp. 513 (D.Md 1977) stated that the exercise of personal jurisdiction under subsection (b)(4) is not dependent on the location of the allegedly tortious conduct. The Court in *McLaughlin* also observed that a single transaction may be sufficient to satisfy due process even though a defendant's acts may fall short of a persistent course of conduct.

Thus, there is ample support for exercising jurisdiction over Heishman in Maryland on the alternate theories that Heishman made a contract to sell the vehicle to a Maryland corporation or that Heishman's alleged negligence caused tortious injury within the State. These theories, coupled with Heishman's consent to the transfer, support this Court's Order of February 27, 1981.

Deletion of the Observation That Maryland Substantive Law Applies to This Case Is Unnecessary, Especially Since It Is a Correct Observation.

The plaintiff's final alternative prayer for relief is for this Court to delete the correct observation that Maryland

substantive law applies to the instant action. Such a deletion is unnecessary as Maryland law does apply to this case since the incident averred to in the plaintiff's Complaint occurred in Maryland. *Lamont v. Haig*, 590 F.2d 1124 (D.C. Cir. 1978). The Court in *McCall v. Susquehanna Electric Co.*, 278 F.Supp. 209 (D.Md. 1968) noticed that a tort is deemed to occur not where the wrongful act has its inception, but rather, where the impact of the act or omission produces such injury as to give rise to a cause of action. This *lex loci delicti* rule has been consistently followed in *Uppgren v. Executive Aviation Services, Inc.*, 326 F.Supp 709 (D.M. 1971), *Frericks v. General Motors*, 274 Md. 288, 336 A.2d 118 *appeal after remand*, 278 Md 304, 363 A.2d 460, (1975) and *Heiserman v. Baltimore & A.R. Co.*, 15 Md App 657, 292 A.2d 140 (1972).

Furthermore, the United States District Court for the District of Maryland will apply the law of its district, Maryland, to this case as explained in 1 Moore's Federal Practice, Paragraph 0.145 [4-5]:

> The statute of limitations aside, normally the substantive law of the transferee state should apply to cases transferred under § 1406 (a), since this result comports best with the underlying reasons for the decision in *Van Dusen v. Barrack*. It gives the plaintiff the benefit of the most advantageous rule of law available to him in a federal court in which venue is proper. It is true that it may sometimes put him to the choice between the most advantageous rule available to him in the state courts and the advantages of suing in a federal forum. Thus in cases in which valid service can be obtained in a particular district but the venue is improper, the plaintiff could localize the law to be applied by suing in the state court, and if the case were removed by the defendant retain the benefit of that law,

but if he brought his action in the federal court and it were transferred for want of proper venue, the transferee court would apply its own law. While this result is an unhappy one in some respects, it is perhaps more properly avoided by a closer equation of federal venue to the availability of service of process than by a rule that encourages deliberate misfiling for the purposes of fixing the law to be applied. (Footnotes omitted).

Conclusion.

The Memorandum Opinion of this Court transferring the instant action to the United States District Court for the District of Maryland due to improper venue in the District of Columbia is a correct decision since the cause of action herein arose in Maryland, the plaintiff is a resident of Maryland and none of the defendants are residents of the District of Columbia. The Motion of the defendants, BMWAG and BMWNA, to transfer this case were properly before this Court on February 27, 1981 as this Court treated the Motion to Certify as Motions for Reconsideration. This Court is without power to substitute parties at this stage of the proceedings.

The allegations of the plaintiff and the Affidavits on file in this case show that the proper forum for this case is the United States District Court for the District of Maryland and since Maryland law will apply in this case, there is no justification for deleting any reference to this fact in the February 27, 1981 Memorandum Opinion.

The Memorandum Opinion being correct in all respects, the plaintiff's Motion for Reconsideration should be denied and this case should be transferred to the United States District Court for the District of Maryland.

Respectfully submitted

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No. 81-829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BMW OF NORTH AMERICA, INC.

and

BAYERISCHE MOTOREN WERKE AG.,

Petitioners,

v.

DANIEL G. GROVE, Executor of the Estate of STUART STILLER

and

LOHR & BROMKAMP GmbH.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether a court of appeals ever has the power to issue a writ of mandamus to prevent an erroneous transfer of a case to a district court in another circuit.

2. Whether the court of appeals abused its discretion in issuing a writ of mandamus to prevent such a transfer in this case, where (a) the district court's transfer order under 28 U.S.C. § 1406(a) was based on a clearly erroneous venue ruling that was not even defended by any of the parties in the court of appeals; (b) a final judgment in the transferee district would inevitably have been reversed because the erroneous transfer would have resulted in the application of a substantially different choice-of-law rule and, ultimately, substantially different rules of substantive law; and (c) issuance of the writ of mandamus was necessary to prevent the irreparable harm that would have been caused by a useless trial in the transferee district.

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IN THE

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OCTOBER TERM, 1981

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and

LOHR & BROMKAMP GmbH.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT OF THE CASE

On April 22, 1980, respondent Daniel G. Grove filed a survival and wrongful death action arising out of the death of Stuart Stiller, a lawyer who resided and practiced in the District of Columbia. Stuart Stiller died from injuries sustained in an automobile accident that occurred while he was driving a 1978 BMW automobile leased by his law firm, a professional corporation organized and located in the District of Columbia. The automobile was sold and leased to Stiller's law firm pursuant to negotiations that took place entirely within the Dis-

trict of Columbia, and a District of Columbia sales tax was charged on the transaction. The car was registered in the District of Columbia, and used by Stuart Stiller principally in the District of Columbia.

The Complaint named four defendants: Heishman BMW, Inc., the dealer; BMW of North America, Inc., the American distributor of BMWs, and Bayerische Motoren Werke AG, the manufacturer of BMWs (hereinafter referred to collectively as "the BMW defendants"); and Lohr & Bromkamp GmbH ("Lohr"), the manufacturer of a component part.

The Complaint was filed in the United States District Court for the District of Columbia. Each of the defendants except Heishman filed a motion to dismiss the Complaint for lack of jurisdiction or, in the alternative, to transfer the case to the United States District Court for the District of Maryland. The BMW defendants, petitioners herein, sought transfer under 28 U.S.C. § 1404(a) for the convenience of the parties and witnesses; defendant Lohr, which is not a petitioner, sought transfer for improper venue under 28 U.S.C. § 1406(a).

The motions of the two BMW defendants to dismiss or transfer were denied by the district court by separate orders dated July 23, 1980, and a joint motion by the BMW defendants for reconsideration was denied by the district court on August 11, 1980. App. Pet. H, I, J.[1] Defendant Lohr's motion to dismiss or transfer was denied on September 8, 1980.

Then, at a status conference held on September 17, 1980, the district judge announced, *sua sponte*, that she would consider a reply memorandum of defendant Lohr, filed after the order denying Lohr's motion, to be a motion for reconsideration. On February 27, 1981, the

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[1] Citations to "App. Pet." refer to the Appendix to the Petition for Certiorari.

district court issued a memorandum opinion and order denying that motion in part and granting it in part.[2] The district court reaffirmed its earlier determinations that the defendants were subject to jurisdiction by virtue of their having transacted business in the District of Columbia within the meaning of D.C. Code § 13-423(a)(1). The district court then ruled that venue was improper as to the moving defendants, and directed that the case be transferred to the District of Maryland pursuant to 28 U.S.C. § 1406(a). App. Pet. E, F. The district court stated:

> "although the Court finds [the moving defendants' business] conduct sufficient to confer *in personam* jurisdiction consistent with the due process clause, no moving defendants' activities constitute doing business within the meaning of [28 U.S.C.] Section 1391(c)." App. Pet. E, at 8a.

The district court then proceeded to transfer the case to Maryland pursuant to 28 U.S.C. § 1406(a), apparently basing its conclusion that the case "could have been brought" there against the non-moving defendant, Heishman, upon the observation that Heishman "expressed no objection" to a transfer to Maryland.

Thus, after issuing three orders denying motions to dismiss or transfer the case, and after denying a joint motion for reconsideration by the two BMW defendants, the petitioners herein, the district judge on her own initiative deemed further motions for reconsideration to have been made and granted those motions. The district court denied motions by respondent Grove for reconsideration and for certification under 28 U.S.C. § 1292(b). App. Pet. G, L at 25a.

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[2] At the September 17 status conference, the court indicated only that it would consider Lohr as having moved for reconsideration, see Transcript of Proceedings, Sept. 17, 1980, at 3. When the court issued its opinion on February 27, however, it stated that the matter was before the court on motions for reconsideration by Lohr *and* the BMW defendants.

Respondent Grove promptly filed a Petition for a Writ of Mandamus and, simultaneously therewith, a brief in support of the Petition. The grounds for the Petition, *inter alia*, were as follows: (1) the district court committed clear error in refusing to apply the rule, endorsed by the District of Columbia Circuit, that a corporation is "doing business" under § 1391(c) if the defendants' business contacts with the district are sufficient to confer personal jurisdiction consistent with the due process clause; (2) the district court erroneously relied on the non-moving defendant's consent to transfer, instead of making the required determination that the action "could have been brought" against that defendant in the transferee district without its consent, *see Hoffman* v. *Blaski*, 363 U.S. 335 (1960); (3) the district court abused its discretion in refusing the plaintiff's request for an opportunity to conduct discovery on the facts pertaining to venue; and (4) under the peculiar circumstances of the case, dismissal without prejudice, rather than transfer, was "in the interest of justice." 28 U.S.C. § 1406(a).

On May 27, 1981, the court of appeals (per Wright, J., and MacKinnon, J.) ordered that responses to the Petition for a Writ of Mandamus be filed. App. Pet. D. Separate responses to the Petition were then filed by the BMW defendants and by Lohr.

On July 2, 1981, the court of appeals (per Tamm, J., and Edwards, J.) ordered that the writ of mandamus should issue. The court held that because the defendants' business contacts with the District of Columbia were sufficient to render them subject to jurisdiction consistent with the due process clause, the defendants were "doing business" in the district for purposes of venue under 28 U.S.C. § 1391(c). Finding that the writ of mandamus was the appropriate remedy "in this case," the court directed the writ to issue.

The court of appeals panel denied a joint motion by Lohr and the BMW defendants to set aside its order

issuing the writ, and also denied a petition for rehearing. App. Pet. B. The court *en banc* also denied a motion to set aside the order issuing the writ of mandamus, and a suggestion for rehearing *en banc*. App. Pet. C. Subsequently, the BMW defendants filed their Petition for a Writ of Certiorari in this Court; defendant Lohr has not joined in that Petition.

Following the issuance of the writ of mandamus, the case has been proceeding before the district court. On October 30, 1981, the district court denied a joint motion by the BMW defendants and defendant Lohr for reconsideration of that portion of its February 27, 1981 decision that upheld jurisdiction over the defendants. App. Brief in Opp. 1a. Discovery is proceeding expeditiously. The district court held a status conference on November 12, and another status conference has been scheduled for April 6, 1982, at which time plaintiff anticipates that the case will be set for trial.

REASONS FOR DENYING THE WRIT

Neither in their response to the Petition for a Writ of Mandamus in the court of appeals nor in their Petition for a Writ of Certiorari in this Court have the BMW defendants made any effort to support or defend the rulings of the district court. Nowhere in their response in the court of appeals or in their Petition in this Court do the BMW defendants contend that the restrictive venue rule adopted by the district court is to be preferred to the prevailing rule endorsed by the court of appeals.[3] Rather, in their response in the court

[3] In a single sentence in their Petition, the BMW defendants suggest that there is "respectable authority" to support the district court's venue ruling. Petition, at 23. They do not, however, argue that the restrictive rule adopted by the district court is correct, or that it is to be preferred to the prevailing rule endorsed by the court of appeals. Indeed, they concede that they never even addressed the venue issue in their response to the mandamus petition in the court of appeals, and they do not ask this Court to consider whether venue was proper.

of appeals the BMW defendants urged simply that mandamus was an inappropriate remedy for the errors that characterized the district court's transfer order. They continue to adhere to that approach in this Court, urging the Court simply to hold that, no matter how egregious the district court's error, mandamus is never an appropriate remedy to correct an erroneous transfer. In fact, as discussed below, there is no authority for the BMW defendants' position.

The petitioners fail altogether to distinguish between the question whether a court of appeals has the *power* to issue a writ of mandamus and the question whether the circumstances exist in a particular case to warrant the exercise of the court's *discretion* to issue the writ. The distinction is a vital one.[4] It is well-established that the courts of appeals have the *power* to issue writs of mandamus in cases such as this. There are numerous cases in which such writs have issued. And the question whether the court of appeals properly exercised its *discretion* in determining that this was an appropriate case for the issuance of the writ does not warrant review by this Court.

I. The Court of Appeals' Decision That It Had The Power To Issue a Writ of Mandamus Is Consistent With The Decisions Of This Court And The Courts Of Appeals.

There can be no serious dispute that the court of appeals had the *power* to issue the requested writ. The power extends to all writs "necessary or appropriate in aid of [the court's] jurisdiction." 28 U.S.C. § 1651(a). And it is well-established that a court of appeals acts "in aid of [its] jurisdiction" when it reviews by mandamus an order transferring a case to a court in another circuit, which if effectuated would prevent appellate

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[4] See generally 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* §§ 3932-34 (1977).

review in the originating circuit. See, *e.g.*, *In re Josephson*, 218 F.2d 174, 181 (1st Cir. 1954).[5] Indeed, as discussed below, there is a long line of cases in which the courts of appeals have issued writs of mandamus correcting erroneous transfer orders.

The case principally relied upon by the petitioners, *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953), does not question the *power* of the courts of appeals to issue writs prohibiting erroneous transfers to another circuit. As the Court expressly noted in that case, the proposed transfer was to a district court in the same circuit. And even in those cases, the Court did not state that mandamus is necessarily an inappropriate remedy to correct erroneous transfer orders. It held only that "*in the circumstances of this case* the writ was inappropriate," because the petitioner had alleged "no special circumstances" and had not shown that its right to issuance of the writ was "clear and indisputable." 346 U.S. at 382, 383, 384 (emphasis added).[6]

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[5] See generally *La Buy* v. *Howes Leather Company*, 352 U.S. 249, 255 (1957); 1 *Moore's Federal Practice* ¶ 0.147, at 1698-99 (2d ed. 1980). One set of commentators has observed:

> "It is easy to conclude that a writ may issue in aid of potential jurisdiction if it is necessary to control action that could not be controlled by awaiting entry of an appealable order, or to remove an obstruction to appellate review. . . . An order transferring a case to a court in another circuit, [for example], would prevent any appellate review of the order in the originating circuit."

16 Wright, Miller, Cooper & Grossmen, *supra*, at 195.

[6] In addition to noting that "it is not clear that adequate remedy cannot be afforded petitioner . . . to prevent some of the . . . procedural problems anticipated" from the transfer, the Court termed the petitioner's venue argument "frivolous." 346 U.S. at 384. Indeed, Justice Frankfurter (joined by Justices Jackson and Minton) felt the challenge to the district court's venue ruling was so frivolous that the writ of certiorari should have been dismissed as improvidently granted:

> "The Court's opinion . . . necessarily leaves open the question whether such a ruling by a district judge may be reviewed by

Since *Bankers Life* was decided in 1953, there have been numerous decisions in which the courts have found it appropriate to issue writs of mandamus to correct erroneous transfer orders. Writs have issued when the district court made an error of law,[7] when it failed to

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mandamus . . . in circumstances where postponement of review would involve a protracted trial, entailing heavy costs and great inconvenience. This Court ought not to be called upon to hold that where a district judge refused to entertain a "frivolous" claim, mandamus will not issue to compel him to entertain it. But that is the only holding of the Court's decision today." 346 U.S. at 388 (citations deleted).

The year before *Bankers Life* was decided, the Court had affirmed by an equally divided Court the granting of a mandamus petition based upon the district court's erroneous venue ruling. *Cardox Corp.* v. *C-O-Two Fire Equipment Co.*, 344 U.S. 861, *aff'g*, 94 F.2d 410 (7th Cir. 1952). In that case the district court had erroneously held venue to be proper and refused to dismiss or transfer the case. And the propriety of the writ is generally "clearer if the trial court has granted a transfer than if it has denied it." 15 Wright, Miller, Cooper & Gressman, *supra*, § 3855, at 307.

[7] See, *e.g.*, *Van Dusen* v. *Barrack*, 376 U.S. 612, 615 n.3 (1964); (explaining that mandamus may lie when the district court "erred in interpreting the legal limitations upon and criteria for a § 1404(a) transfer"); *Hoffman* v. *Blaski*, 363 U.S. 335, 340 n.9 (1960); *Caleshu* v. *Wangelin*, 549 F.2d 93 (8th Cir. 1977); *Scriptomatic, Inc.* v. *United States District Court*, 545 F.2d 1156 (9th Cir. 1976); *Commercial Lighting Products, Inc.* v. *United States District Court*, 537 F.2d 1078 (9th Cir. 1976); *Skil Corp.* v. *Millers Falls Co.*, 541 F.2d 554 (6th Cir.), *cert. denied*, 429 U.S. 1029 (1976); *Aaacon Auto Transport Inc.* v. *Napco*, 490 F.2d 83 (2d Cir. 1974); 15 Wright, Miller, Cooper & Gressman, *supra*, § 3855, at 307 n.24. The cases have generally involved § 1404(a) transfers (§ 1404(a) transfers are more common than § 1406(a) transfers), but there is no reason to treat review of legal errors any differently in § 1406(a) cases, 1 *Moore's Federal Practice* ¶ 0.147, at 1701, and legal errors have been corrected by mandamus in § 1406(a) cases. *See, e.g.*, *Varsic* v. *United States District Court*, 607 F.2d 245 (9th Cir. 1979); *C-O Two Fire Equipment Co.* v. *Barnes*, 194 F.2d 410, *aff'd by an equally divided court*, 344 U.S. 861 (1952).

consider the proper statutory criteria for transfer,[8] and when it failed to afford a proper hearing.[9] In a recent case quite similar to this one, *Varsic* v. *United States District Court*, 607 F.2d 245 (9th Cir. 1979), the Court of Appeals for the Ninth Circuit issued a writ of mandamus to correct a § 1406(a) transfer based on an erroneous ruling that venue was improper. The Ninth Circuit obviously did not feel that this Court's decision in *Bankers Life* precluded issuance of the writ.

In an earlier case, the District of Columbia Circuit quoted the prevailing view, as stated by the Second Circuit:

> "The government argues that this court lacks mandamus jurisdiction to review a transfer of venue . . . . That position is incorrect . . . . Following an extensive analysis, the Second Circuit has concluded that there is a mandamus jurisdiction 'to correct the disposition of a transfer motion by the district court, even where the district court has purported to consider proper factors' and that this is the view reflected in the 'great majority of recent appellate decisions,' *A. Olinick & Sons.* v. *Dempster Bros., Inc.*, 365 F.2d 439, 443 (2d Cir. 1966)."

Fine v. *McGuire*, 433 F.2d 499, 500-01 (D.C. Cir. 1970).

In part, the numerous decisions approving the use of mandamus to correct erroneous transfers may reflect a trend by which "[t]he Supreme Court in the recent past has . . . unmistakably enlarged the area in which mandamus may be suitably employed." *National Right to Work Legal Defense and Education Foundation* v. *Richey*, 510 F.2d 1239, 1242 (D.C. Cir.), *cert. denied*, 422 U.S. 1008 (1975). The traditional view was that mandamus is available " 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to

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[8] See, *e.g.*, *Wiren* v. *Laws*, 194 F.2d 872 (D.C. Cir. 1951); *Ex parte Chas. Pfizer & Co.*, 225 F.2d 720, 722 (5th Cir. 1955).

[9] See, *e.g.*, *Fine* v. *McGuire*, 433 F.2d 499 (D.C. Cir. 1970).

exercise its authority when it is its duty to do so' "—a view that was tempered by a non-technical definition of what constitutes a matter of "jurisdiction." *Will* v. *United States*, 389 U.S. 90, 95 (1967). The traditional view has been enlarged somewhat by the recognition that mandamus may be appropriate as an exercise of appellate supervisory power, *La Buy* v. *Howes Leather Company*, 352 U.S. 249 (1957), as an exercise of "advisory" authority, *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), or as a means of accommodating "any weighty equitable reason." *National Right to Work Legal Defense and Education Foundation* v. *Richey*, 510 F.2d at 1243.

Even under the traditional view of mandamus, however, errors of transfer have often been considered to be in the class of "jurisdictional" errors appropriate for review by mandamus. In *Colonial Times, Inc.* v. *Gasch*, 509 F.2d 517 (D.C. Cir. 1975), the court made clear that transfer errors have never fallen into that "class of errors which are, no matter how egregious, not 'jurisdictional' and not within the class of errors cognizable in mandamus." 509 F.2d at 523-24 and n.19. Indeed, Professor Moore has emphasized that "if there is to be an adequate appellate review of [transfer] orders . . . , appellate review must often come before final judgment," by mandamus if necessary. 1 *Moore's Federal Practice* ¶ 0.147, at 1698.

In sum, there is ample authority for the court of appeals' power to issue the writ in this case.

II. The Question Whether The Court of Appeals Abused Its Discretion In Issuing The Writ Does Not Warrant Review By This Court.

Since the court of appeals possessed the power to issue the writ in this case, its decision can be reversed only if it abused its discretion in determining that the writ should issue. And the question whether the court of appeals abused its discretion is not one that warrants re-

view by this Court. Indeed, the question has not even been presented squarely to the Court. Although this Court has emphasized that "issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed," *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976), the petitioners here have studiously avoided any mention of the circumstances that might be relevant to a review of such a discretionary decision. They have confined themselves to the argument that, regardless of the circumstances of a particular case, mandamus does not lie to correct erroneous transfers.

If the Petition nevertheless is deemed fairly to present the question whether the court of appeals abused its discretion, the petitioners certainly have provided no reason why that question deserves this Court's attention. To the contrary, their failure—both in this Court and the court of appeals—to defend the district court's venue ruling makes this case a peculiarly inappropriate one for review of how the court of appeals exercised its discretion.

It is clear, in any event, that there was no abuse of discretion in this case. Respondent Grove made a strong showing in the court of appeals that under the "special circumstances" of this case his right to issuance of the writ was "clear and indisputable," *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. at 383, 384, and that there was "no other adequate means to attain the relief he desire[d]." *Kerr* v. *United States District Court*, 426 U.S. at 403. Among those circumstances were the following:

—The district court committed clear error in refusing to adhere to the rule—previously endorsed in the D.C. Circuit and elsewhere,[10] and unchallenged by the defend-

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[10] See *e.g.*, *Houston Fearless Corp.* v. *Teter*, 318 F.2d 822, 825 (10th Cir. 1963); *Mutual International Export Co.* v. *Napco Indus-*

ants in the court of appeals—that business contacts sufficient to support jurisdiction are sufficient to establish venue under 28 U.S.C. § 1391(c). This case thus stands in sharp contrast to *Bankers Life*, in which the Court explained that the petitioner's theory of venue "has all the earmarks of a frivolous albeit ingenious attempt to expand the statute." 346 U.S. at 384. It is well-established that the "clearer" the district court's error "the more appropriate will be the writ's issuance." *Morrow* v. *District of Columbia*, 417 F.2d 728, 737 (D.C. Cir. 1969).

—The district court's erroneous venue ruling presented an "issue of pure law," which lends itself readily to review by mandamus. See *Colonial Times, Inc.* v. *Gasch*, 509 F.2d at 524. No review of the facts was necessary to correct the district court's purely legal errors.

—Review by mandamus was essential to enable the court of appeals to delineate the venue rules to be followed in the circuit, and to exercise its "supervisory control" over a district court that had disregarded the rule previously adopted in the circuit. See *La Buy* v. *Howes Leather Company*, 352 U.S. at 259-60. An appeal after judgment would have been to the court of appeals for the Fourth Circuit. By contrast, in *Bankers Life* the court emphasized that both the transferor and transferee

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tries, Inc., 316 F.2d 393, 397 (1963) (Wright, J., concurring); *Stith* v. *Manor Baking Co.*, 418 F. Supp. 150, 155 (W.D. Mo. 1976); *Westphal* v. *Stone Manufacturing Co.*, 305 F. Supp. 1187, 1191 (D.R.I. 1969); *Nelson* v. *Victory Electric Works, Inc.*, 210 F. Supp. 954, 956 (D. Md. 1962); *Patin* v. *Sioux City and New Orleans Barge Lines, Inc.*, 253 F. Supp. 984, 986 (W.D. La. 1966); *Kanton* v. *United States Plastics, Inc.*, 248 F. Supp. 353, 360 (D. N.J. 1965); *Sheldon Steel Corp.* v. *Standard Fruit Co.*, 219 F. Supp. 521, 522-23 (D. Del. 1963); *Paragon Oil Co.* v. *Panama Refining & Petrochemical Co.*, 192 F. Supp. 259, 261-62 (S.D.N.Y. 1961). The commentators have uniformly endorsed the rule adopted in these cases, and there is no conflict among the circuits. See, *e.g.*, 1 *Moore's Federal Practice*, ¶ 0.142[5.-1-3] at 1411; 15 Wright, Miller, Cooper & Gressman, *supra*, § 3811, at 65.

courts were within the same circuit, and an appeal after judgment would therefore "remain . . . within the realm of the same court of appeals." 346 U.S. at 384.

—The transfer would have seriously prejudiced plaintiff Grove, and mandamus was the only "adequate means to attain the relief he desire[d]." *Kerr* v. *United States District Court*, 426 U.S. at 394. While an erroneous transfer will often constitute harmless error, the transfer in this case would almost certainly have resulted in reversal of a final judgment because the trial would have been conducted according to the wrong jurisdiction's set of substantive legal principles. Unlike a transfer for the convenience of parties and witnesses under 28 U.S.C. § 1404(a),[11] a transfer for improper venue under § 1406(a) results in the application of the transferee jurisdiction's choice-of-law principles.[12] In this case, the district court's transfer would have resulted in the application of Maryland choice-of-law principles, which differ substantially from the District of Columbia's,[13] and ultimately in the application of an entirely different set of substantive rules of law. Reversal of a final judgment would have been virtually inevitable. And the damage that a useless trial in Maryland would have caused petitioner, the executor of an estate with limited resources and with an interest in prompt resolution of the controversy, would have been irreparable. See *Varsic* v. *United States District Court*, *supra*. Review by man-

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[11] See *Van Dusen* v. *Barrack*, 376 U.S. 612, 626-39 (1964).

[12] See 1 *Moore's Federal Practice* ¶ 0.145[4.5], at 1613.

[13] The District of Columbia has adopted the so-called governmental interest approach to choice-of-law questions. *Tramontana* v. *S. A. Empresa De Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966); *Fowler* v. *A & A Co.*, 262 A.2d 344, 348-49 (D.C.C.A. 1970). Maryland has not adopted that approach, but has continued to apply the *lex loci delicti* principle. See *White* v. *King*, 244 Md. 348, 223 A.2d 763 (1966).

damus was the only method of preventing that irreparable harm from occurring.

Additional circumstances were presented to the court of appeals, but those listed above are sufficient to demonstrate that the issuance of the writ in this case corrected a clear error by the district court that otherwise would have evaded review by the court of appeals and imposed a substantial hardship upon respondent Grove. It certainly cannot be said that the issuance of the writ in those circumstances was an abuse of the court of appeals' discretion.

III. Petitioners' Contention That The Court of Appeals Failed To Allow Full Briefing And Argument Is Insubstantial.

Petitioners complain that they were never given an opportunity to present briefs and oral argument in opposition to the Petition for a Writ of Mandamus. This complaint is frivolous. After respondent Grove filed his Petition for a Writ of Mandamus and an accompanying brief on the merits, the court of appeals directed the defendants to file a response. They filed their response, respondent Grove filed a reply brief, and the court of appeals proceeded to rule. Now, for the first time, the BMW parties contend that their response was never intended as a full brief, and that they should have received notice to file a full brief before the writ was issued. In view of the fact that the court of appeals called for a response from the BMW parties after receiving a full brief on the merits from respondent Grove, it is somewhat peculiar for the BMW parties to take the position that only a partial response was required.

In any event, the matter is not worthy of this Court's attention, because it was never presented to the court of appeals. Although the BMW parties petitioned the panel for rehearing, requested rehearing *en banc*, and moved both the panel and the court *en banc* to set aside the writ

of mandamus, they never complained that they had been deprived of an opportunity to present briefs to the court of appeals. That is a contention that has arisen for the first time in the Petition for a Writ of Certiorari, and it is not properly presented to this Court in the first instance.

Petitioners did complain to the court of appeals panel and to the court *en banc* that they were denied the opportunity to present oral argument in opposition to the Petition for a Writ of Mandamus. Both the panel and the court *en banc* denied motions to set the writ aside on that ground, and refused to grant rehearing on that ground. The matter does not warrant review by this Court.

IV. Review By This Court Would Seriously Disrupt An Ongoing Case.

As noted above, see page 5, *supra*, this case is proceeding expeditiously toward trial in the United States District Court for the District of Columbia. Should this Court grant the Petition for a Writ of Certiorari and review the judgment of the court of appeals, the case would obviously be derailed and the trial delayed.

Even more importantly, under the peculiar circumstances of this case any decision by this Court in petitioners' favor would inevitably result in a reversible judgment in the district court in Maryland. Petitioners have not challenged the correctness of the court of appeals' ruling that venue is proper in the District of Columbia; their petition rests solely on the contention that, regardless of the correctness of the court of appeals' venue ruling, mandamus was an inappropriate remedy. Were this Court to embrace that contention, the case would be transferred to the United States District Court for the District of Maryland, notwithstanding the fact that the law in the District of Columbia Circuit (as stated in this case and at least one previous

case)[14] is that venue is proper in the District of Columbia in this case. Even if the Court of Appeals for the Fourth Circuit did not feel bound by the D.C. Circuit's venue rule in reviewing a judgment in this case, there is every reason to believe that it would adopt that rule on its own.[15]

In short, the Fourth Circuit would inevitably hold that venue was proper in the District of Columbia and that the transfer was erroneous. And because an erroneous transfer for improper venue under § 1406(a) will have resulted in the application of the wrong choice-of-law rules and the wrong set of substantive rules of law, see p. 13, *supra*, the Fourth Circuit would in all likelihood be required to reverse the judgment. The parties would thus be required to try the case a second time—this time in the District of Columbia where it is now proceeding toward trial.

Thus, in the peculiar circumstances of this case, the limited relief sought by the petitioners could only wreak havoc on the orderly progress of the case toward final judgment. For this reason as well, the petition should be denied.

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[14] See note 9, *supra*.

[15] The Fourth Circuit has not previously considered the issue, but the district court in Maryland has adopted the same rule as the D.C. Circuit and numerous other courts. See *Nelson* v. *Victory Electric Works, Inc.*, 210 F. Supp. 954, 956 (D. Md. 1962); *Wanamaker* v. *Lewis*, 153 F. Supp. 195 (D. Md. 1957).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1012
(Green, J.)

DANIEL G. GROVE, Executor of the Estate
of Stuart Stiller,
Plaintiff,

v.

HEISHMAN BMW, INC.,
BMW OF NORTH AMERICA, INC.,
BAYERISCHE MOTOREN WERKE AG.
LOHR & BROMKAMP GmbH.,
Defendants.

[Filed Oct. 30, 1981]

ORDER

IT IS HEREBY ORDERED this 30th day of Oct., 1981 that the Joint Motion For Reconsideration Of The In Personam Jurisdictional Finding Of This Court is denied.

/s/ June L. Green
United States District Judge

Petitioner's Reply Brief

Office - Supreme Court, U.S.
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CLERK

No. 81-829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BMW OF NORTH AMERICA, INC.

and

BAYERISCHE MOTOREN WERKE A.G.

Petitioners

v.

DANIEL G. GROVE, EXECUTOR OF THE ESTATE OF STUART STILLER

and

HEISHMAN BMW, INC.

and

LOHR & BROMKAMP GmbH

Respondents

REPLY BRIEF OF PETITIONERS, BMW OF NORTH AMERICA, INC. AND BAYERISCHE MOTOREN WERKE A.G., TO THE BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

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No. 81-829

BMW OF NORTH AMERICA, INC.

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BAYERISCHE MOTOREN WERKE A.G.

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v.

DANIEL G. GROVE, EXECUTOR OF THE ESTATE OF STUART STILLER

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Respondents

REPLY BRIEF OF PETITIONERS, BMW OF NORTH AMERICA, INC. AND BAYERISCHE MOTOREN WERKE A.G., TO THE BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I. Respondent Has Cited Only A Ninth Circuit Opinion As Authority To Support The Court Of Appeals' Issuance Of A Writ Of Mandamus To Vacate A § 1406(a) Transfer.

Throughout his Brief in Opposition Respondent Grove has failed to distinguish transfers under 28 U.S.C. § 1404(a) and 28 U.S.C. § 1406(a). The distinction is vital since no decision of

this Court has permitted a § 1406(a) transfer to be disrupted by the issuance of a writ of mandamus. In fact, Respondent Grove fails to support the Court of Appeals decision in this case or to even distinguish *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953), which specifically holds that mandamus is not an appropriate remedy to vacate a severance and transfer order entered by a district court judge on the ground of improper venue under 28 U.S.C. § 1406(a). Instead, Respondent Grove misstates the position of these Petitioners[1] and confuses the issues presented for review.

With the exception of one case, *Varsic* v. *United States District Court*, 607 F.2d 245 (9th Cir. 1979), Respondent Grove has cited no case since *Bankers Life* which has allowed the remedy of mandamus to alter a § 1406(a) transfer order.[2] Respondent Grove's statement that "since *Bankers Life* was decided in 1953, there have been numerous decisions in which the courts have found it appropriate to issue writs of mandamus to correct erroneous transfer orders," Brief in Opp. p. 8, is the result of a lack of understanding between § 1406(a) and § 1404(a) transfers and, with respect to § 1406(a) transfers, the statement is clearly in error.[3] This Court in *Van Dusen* v.

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[1] Petitioner BMW of North America, Inc. is a wholly owned subsidiary of Petitioner Bayerische Motoren Werke A.G. *See also*, footnotes four and five in the Petition for a Writ of Certiorari.

[2] Petitioners have reviewed, in detail, the Respondent's citations of authorities, however, no attempt will be made herein to thoroughly distinguish each of those cases. In summary, the Petitioners assert that a simple reading will demonstrate that few of the cited cases are, in fact, precedent for the contentions raised in the Brief in Opposition.

[3] If, as is advanced by Respondent, § 1406(a) and § 1404(a) transfers were treated equivalently, then many of the arguments raised in the Brief in Opposition may be quickly disgarded. For example, Respondent Grove complains of the possibility of a trial being "conducted according to the wrong jurisdiction's set of substantive legal principles." Brief in Opp. p. 13. A similar argument was recently rejected by this Court in *Piper Aircraft Co.* v. *Reyno*, 50 U.S.L.W. 4055 (Dec. 8, 1981), wherein the Court stated "[t]he

Barrack, 376 U.S. 612 (1964), observed that in a § 1404(a) situation there are at least two proper forums, whereas in a § 1406(a) transfer, venue in the chosen forum is wrongly or improperly laid in the first instance. 376 U.S. at 634. And any errors in a § 1406(a) transfer, being errors of law, should await an appeal after final judgment. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953).

The only cited decision allowing a § 1406(a) transfer to be vacated through a writ of mandamus, *Varsic* v. *United States District Court*, *supra*, (the only such case in the thirty years since *Bankers Life* was decided) is readily distinguished from this case on its facts. In *Varsic* a *pro se* plaintiff had brought an action under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, a statute through which Congress had clearly and exhaustively intended to provide "ready access to the Federal Courts," 29 U.S.C. § 1001(b), by a liberal venue policy.[4] *See*, H.R. Rep. No. 533, 93rd. Cong., 1st Sess. 17 (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4655. When the defendants in *Varsic* obtained a transfer from the United States District Court for the Central District of California to the United States District Court for the Southern District of New York the plaintiff was in effect denied his cause of action and burdened "in a way which Congress explicitly attempted to prevent." 607 F.2d at 252. However, none of the extreme circumstances presented in

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possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight," 50 U.S.L.W. at 4058, in the decision whether to dismiss on *forum non conveniens* grounds after a § 1404(a) transfer.

[4] 29 U.S.C. § 1132(e)(2) states: "Where an action under [ERISA] is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found."

Varsic which justified the deviation from the Congressional intent to proscribe piecemeal appeals appear in this case.[5] *Varsic* is thus clearly not "quite similar to this one" as Respondent Grove suggests. Brief in Opp. p. 9.

Respondent Grove seems to argue that since the All Writs Act, 28 U.S.C. § 1651(a), confers the power to issue extraordinary writs on the courts of appeals, any unfavorable trial ruling may be remedied by a writ of mandamus. This view, however, totally ignores the extraordinary nature of mandamus and the Congressional policy to limit appeals until a final judgment has been rendered. *See, Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21 (1943); *Will* v. *United States*, 389 U.S. 90 (1967). As the Court in *Roche* noted, even an erroneous decision made within the exercise of a district court's jurisdiction does not authorize the substitution of mandamus as a means of a pre-judgment appeal. 319 U.S. at 32. Nor may discretion be controlled by mandamus, *Wilbur* v. *United States*, 281 U.S. 206, 218 (1929).

Respondent Grove would have this Court overlook the extraordinary nature of mandamus[6] and sanction the Court of Appeals' present procedure of allowing intermittent appeals by ignoring the ramifications of mandamus petitions to alter transfer orders in the District of Columbia Circuit. Currently, every transfer order of the United States District Court for the District

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[5] The court in *Varsic* cautioned against the use of mandamus in less than drastic situations by quoting from its earlier decision denying mandamus to vacate a § 1406(a) transfer in *Gulf Research & Dev. Co.* v. *Harrison*, 185 F.2d 457 (9th Cir. 1950), wherein the court commented "[t]he remedy of appeal from a final judgment is 'inadequate' so as to justify the use of mandamus only when it is totally unavailable, or when, because of the particular circumstances it could not correct extraordinary hardship." 607 F.2d at 251.

[6] It is interesting to note that Respondent Grove does not even use the word "extraordinary" in his Brief in Opposition.

of Columbia is potentially subject to a premature review via mandamus because each such transfer is to another circuit. Since no guidelines have been announced by the United States Court of Appeals for the District of Columbia Circuit as to when such transfers will be reviewable by mandamus petitions, the extraordinary remedy will become an accepted appellate procedure without this Court's guidance.

II. Petitioners Have Suffered Prejudice By The Failure Of The Court Of Appeals To Follow The Rules Of Appellate Procedure.

In the Brief in Opposition Respondent Grove seriously misrepresents the proceedings before the Court of Appeals in this case so as to characterize the position of Petitioners as "frivolous." Respondent Grove incorrectly asserts that these Petitioners have "now, for the first time," contended that they should have been permitted to file briefs. In their Joint Motion to Set Aside Order Issuing Writ of Mandamus, Petition for Rehearing and/or Suggestion for Hearing *En Banc* (Joint Motion) (App. A),[7] these Petitioners urged the Court of Appeals "to allow the Respondents [Petitioners herein] the opportunity to present oral argument and, if requested, to *file briefs* on the issues of venue and jurisdiction . . ." (emphasis added) (App. A p. 3a). This request paralleled F.R. App. P. 21 which was quoted early in the Joint Motion: "[t]he clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument." (App. A p. 3a-4a). The facts underlying the argument of Respondent Grove that this issue was not raised below conclusively demonstrate the Respondent to be in error.

Respondent Grove has missed the point of these Petitioners' argument that this Court should exercise its power of supervision over the Court of Appeals for the failure of the lower court

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[7] Citations to "App." refer to the appendix to this Reply brief.

to follow the applicable appellate rules. By granting the mandamus petition without notice to the parties that the court would do so without oral argument and by denying oral argument without the unanimous consent of a three judge panel in violation of F.R. App. P. 21(b), F.R. App. P. 34(a) and D.C. Cir. R. 11(d), the Court of Appeals did not fully and properly consider the merits of the petition for a writ of mandamus nor the far reaching implications of its holding on this case and in future cases involving transfer orders. The failure of the Court of Appeals to follow the rules of appellate procedure resulted in these Petitioners being denied their right to be heard on jurisdictional and venue issues identified by the Court of Appeals as crucial. Even though those issues were not properly before the Court of Appeals so as to authorize briefing and argument, the dicta in the Order granting mandamus (App. Pet. A p. 1a-2a)[8] may, absent review by this Court, be construed at both the trial and appellate levels as the law of this case.[9]

III. Contrary To Respondent's Assertions, Review By This Court Will Significantly Advance The Termination Of This Case By Preventing A Useless Trial In An Improper Forum.

The final point raised by Respondent Grove is that review by this Court could disrupt an ongoing case. In view of the fact that every issuance of a writ of mandamus to review a transfer order involves ongoing litigation, Respondent Grove's argument is somewhat unclear.[10] The argument of the Respondent seems to

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[8] Citations to "App. Pet." refer to the appendix to the Petition for a Writ of Certiorari.

[9] A more elaborate discussion of this point appears in pages 20-21 of the Petition for a Writ of Certiorari.

[10] Respodent's contention that "this case is proceeding expeditiously toward trial," Brief in Opp. p. 15, is now incorrect, as these Petitioners on December 28, 1981, filed a Motion for a Stay of Proceedings in the district court. Petitioners delayed the filing of the said motion until outstanding interrogatories which Respondent Grove had propounded to Petitioners had been answered.

be that a decision in this Court favorable to Petitioners would in some manner "inevitably result in a reversible judgment in the district court in Maryland," Brief in Opp. p.15, as "[t]he Fourth Circuit would inevitably . . . and in all likelihood be required to reverse the judgment." Brief in Opp. p.16. Respondent's argument rests on the incorrect assumption that venue is improper in the District of Maryland; however, under the facts of this case, the transfer order was entered to prevent a useless trial in the improperly chosen forum of the plaintiff.

The United States District Court for the District of Maryland is the proper forum for this litigation as Maryland is, *inter alia*, the situs of the accident (App. Pet. M. p.31a), hence, the judicial district where the claim arose, 28 U.S.C. § 1391(a), the residence of the executor of the decedent's estate (App. Pet. M.p.28a) and the home of the treating physicians and most of the witnesses (App. Pet. T.). Moreover, the owner of the automobile involved in the collision is a Maryland corporation (App. Pet. T. p.77a) and the vehicle is presently located in Maryland (App. Pet. T.p.79a). Since the defendants are no less amenable to suit in Maryland under Maryland's long-arm statute, Md. Ann. Code Cts. & Jud. Proc. Art. §6-103(b), than in the District of Columbia, Maryland is the district where this case initially could and should have been brought. (App. Pet. U).

The United States District Court for the District of Columbia is an improper forum for this action under 28 U.S.C. § 1391(c), 13 D.C. Code Ann. § 423 (1981 ed.) and *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). Neither the Petitioners or Respondent Lohr & Bromkamp GmbH (Lohr) is "incorporated or licensed to do business or is doing business," 28 U.S.C. § 1391(c), within the District of Columbia. (App. Pet. O,Q,R,S). Respondent has simply urged that his decedent's unilateral activities within the District of Columbia are sufficient to confer *in personam* jurisdiction over the Petitioners and that those unilateral activities *ipso facto* create proper venue

in the District of Columbia. This view of the Respondent is directly in conflict with *Mosley* v. *Nationwide Purchasing, Inc.*, 485 F.2d 418 (Temp. Em Ct. App. D.C. 1973), where the court noted that the two "doing business" tests were not equivalents and that a plaintiff could not rely on his own activities to establish jurisdiction and venue. [11]

Since venue is proper in the United States District Court for the District of Maryland and improper in the District of Columbia, review by this Court will prevent a useless trial and will allow this Court to delineate the situations in which mandamus is available to review transfer orders between district courts of different circuits.

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[11] The court in *Mosley* further observed that "[v]enue was . . . laid in the 'wrong district' and transfer 'in the interests of justice' under [28 U.S.C.] section 1406(a) was within the discretion of the trial court." 485 F.2d at 421. Respondent Grove herein would thus have this Court sanction mandamus as a means of compelling the discretion of the trial court in his favor which is not permitted. *Wilbur* v. *United States*, 281 U.S. 206, 218 (1929).

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari, the Writ of Certiorari should issue, the Writ of Mandamus should be vacated and the order of the district court transferring this case to the United States District Court for the District of Maryland should be reinstated.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 81-1482

IN RE DANIEL G. GROVE,
Executor of the Estate
of Stuart Stiller,
Petitioner.

Respondent's Joint Motion To Set Aside Order Issuing Writ Of Mandamus, Petition For Hearing And/Or Suggestion For Hearing En Banc

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Concise Statement Of
Issues And Their Importance

The Respondents, Heishman BMW, Inc., BMW of North America, Bayerische Motoren Werke A.G. and Lohr & Bromkamp GMBH, respectfully petition this Court to set aside its Order of July 2, 1981, issuing the Writ of Mandamus vacating the Order of the U.S. District Court which transferred this case to the District of Maryland and to allow the Respondents the opportunity to present oral argument and, if requested, to file briefs on the issues of venue and jurisdiction, for the following reasons:

1. This Court has failed to comply with the Federal Rules of Appellate Procedure and the local rules of this Court.
2. This Court has ruled on an issue not before the Court.
3. The Order of July 2, 1981 issued by this Court is contrary to the law as dictated by the Supreme Court of the United States.

Argument

I.

The Court Has Failed To
Comply With The Federal
Rules Of Appellate Procedure
And The Local Rules Of This Court

On May 4, 1981, the Petition for Writ of Mandamus was filed. On May 27, 1981, this Court issued an Order that responses to the Petition be filed. Respondents timely filed their Responses. Thereafter, without notice or opportunity for oral argument being given to the Respondents, this Court ordered that the Writ of Mandamus issue. The rules of this Court require both that notice of the date of oral argument be given to the parties and that oral argument be allowed unless notice is given that oral argument will not be needed.

When this Court issued its Order of May 27, 1981, the requirements of Federal Rule of Appellate Procedure 21(b) came into force. When it is determined that responses to a petition for writ of mandamus are to be filed, then Rule 21 requires, *inter alia*, the following: "The clerk shall advise the parties of the dates on which briefs are to

be filed, if briefs are required, and of the date of oral argument." These Respondents have never been notified by the Clerk of a date for oral argument. Nevertheless, this Court ruled on the petition without any hearing.

In order for this Court to grant a petition for a writ of mandamus without oral argument, it must first comply with Federal Rule of Appellate Procedure 34 and with Local Rule 11(d). These rules set forth the criteria and requirements for disposing of a case without oral argument. The following guidelines must first be complied with:

1. The determination that oral argument is not needed must unanimously be made by a three-judge division.
2. Notice must be given to the parties by the Clerk that such a determination has been made.

Only after both the determination and notice of the determination may the Court then proceed to dispose of this case.

However, this Court's Order of July 2, 1981, was issued without either of the above two requirements being met. First, the Order was not unanimously issued by a three-judge panel. Judge McGowan did not participate in the Order. Secondly, the Court proceeded to grant the petition without notice to the parties that it would do so without oral argument.

II.

The Court Has Ruled On An Issue Not Before The Court

The use of mandamus in this case by the U.S. Court of Appeals for the District of Columbia Circuit and the basis for the ruling as contained in the Court's Order of July 2, 1981 demonstrates a classic example of why this extraordinary writ does not lie in this situation. The Court has utilized, as a portion of its reasoning and basis for its Order, the finding of the U.S. District Court for the District of Columbia on the issue of *in personam* jurisdiction. That finding of the District Court is taken as correct by this Court without any aspect of the underlying facts and circumstances, as considered by the District Court, being reviewed. Appropriately, that issue was not briefed or

argued because it would amount to an appeal from an interlocutory Order, reviewable only on appeal at the conclusion of the case. In essence, this Court's determination that mandamus is the appropriate remedy allows a piece meal appeal which is never favored. In *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953) the Supreme Court of the United States stated:

> If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. "The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piece-meal appeal. (28 U.S.C. §§ 1291, 1292) Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power" of the sort held to justify the writ in *De Beers Consolidated Mines* v. *United States*, 325 U.S. 212, 217 (1945). This is not such a case. 346 U.S. at 382.

It could be argued on subsequent appeal that this Court's Order of July 2, 1981 issuing the Writ of Mandamus has in effect affirmed the District Court's Memorandum Opinion of February 27, 1981 which found *in personam* jurisdiction over the Respondents. However, that Memorandum Opinion was not before this Court for review, and thus its utilization in the issuance of the Order of July 2, 1981 was improper. Moreover, the respondents consider that ruling by the District Court to be erroneous.

By way of example of some of the facts which were before the District Court the Respondents refer the Court to the unopposed affidavit of Herman Marten, the managing director of Lohr & Bromkamp GMBH, attached hereto as Exhibit A and to the affidavit of Jost J. Schmitt which was previously filed as Exhibit 21 accompanying the Response to the Petition for a Writ of Mandamus filed by Bayerische Motoren Werke A.G. and BMW of North America, Inc. These affidavits address the criteria set forth in the case of *International Shoe* v. *Washington*, 326 U.S. 310 (1945) and demonstrate the lack of constitutional requirements necessary to invoke *in personam* jurisdiction.

Additionally, it should be noted that the accident giving rise to this litigation occurred in the State of Maryland, and therefore the law of that state would govern the wrongful death and survival claims of the petitioner.

III.

The Order Of July 2, 1981 Issued By This Court Is Contrary To The Law As Dictated By The Supreme Court Of The United States

The Order of this Court by Judge Tamm and Judge Edwards, which was issued "Per Curiam," without participation by Judge McGowan, vacated the lower Court's Order transferring this case to the United States District Court for the District of Maryland, holding that a Writ of Mandamus was the appropriate remedy in that:

> "In this case the district court's finding of improper venue in the District of Columbia would evade review absent the remedy of mandamus. The district court found that the defendants were 'doing business' in the District of Columbia under the standards of *International Shoe* v. *Washington, supra*, and under 13 D.C. Code § 423(a)(1). The defendants were, therefore, 'doing business' in the District of Columbia for purposes of venue under 28 U.S.C. § 1391(c)."

This Court also found that the Supreme Court's ruling in *Bankers Life & Casualty Co.* v. *Holland, supra* was not dispositive of the issue of venue as presented in this case. In doing so, this Court, in support of its Order, set forth the following statement of obiter dictum:

> "whatever 'judicial inconvenience and hardship' [existed would] remain, after transfer, within the realm of the same court of appeals which had denied the writ, since both of the districts were within that circuit . . ." *Id.* at 384.

In *Banker's Life and Casualty Co.* v. *Holland, supra* the Supreme Court held that mandamus is not an appropriate remedy to vacate a severance and transfer order entered by a district court judge on the ground of improper venue under 28 U.S.C. § 1406(a). In that case, the district court had first determined that it had jurisdiction of the cause under 28 U.S.C. § 1391. With that finding as its starting point,

the district court decided that venue was improper and under the identical statute invoked herein transferred the case to another district. The Petitioner, Banker's Life and Casualty Company, sought to vacate the transfer order via a writ of mandamus directed to the trial judge. The Supreme Court affirmed the denial of the Writ of Mandamus holding that such a writ against a federal district court judge was not the appropriate remedy to vacate a transfer order posed on the ground of improper venue under 28 U.S.C. 1406(a).

This Court finds that mandamus lies in this case, in spite of *Bankers Life & Casualty Co.* v. *Holland, supra,* because it believes review of this issue of venue would be evaded if this case were transferred. In fact, the issue could be reviewed, but by the U.S. Court of Appeals for the Fourth Circuit and not this Court, just as all the other issues would be. Under this Court's finding, each transfer of federal litigation to a different circuit would be reviewable by mandamus. However, as Judge Leonard Hand observed, the power to protect jurisdiction by mandamus does not extend to protecting it against the jurisdiction of another federal appeals court. *Magnetic Engineering & Manufacturing Co.* v. *Dings Manufacturing Co.*, 178 F.2d 866, 869 (2d Cir. 1950). Thus, there is simply no basis for issuance of a writ in this case.

Conclusion

For the reasons stated above, this Court should grant Respondent's Request.

Respectfully submitted,

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Exhibit A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1012

DANIEL G. GROVE,
Executor of the Estate
of Stuart Stiller,
Plaintiff,
v.

HEISHMAN BMW, INC; BMW OF NORTH AMERICA, INC.; BAYERISCHE MOTOREN WERKE A.G.; AND LOHR & BROMKAMP GmbH.
Defendants.

Affidavit In Support Of Motion To Dismiss Of Defendant Lohr & Bromkamp GmbH.

Hermann Marten being duly sworn, deposes and says:

1. I am the Managing Director ("Geschaftsfuhrer") of Lohr & Bromkamp GmbH ("Lobro"), a defendant in this action, and make this affidavit in support of Lobro's motion to dismiss for lack of jurisdiction over its person.

2. I have been Managing Director of Lobro since 1974, and have held various other positions with the Company since joining it in 1953. In my present position, I am generally responsible for all Company affairs, including the sales and distribution of all Lobro's products. I make this affidavit based on personal knowledge gained during my tenure at Lobro.

3. Lobro is a corporation organized under the laws of the Federal Republic of Germany, with its sole place of business in Offenbach am Main, Federal Republic of Germany.

4. Lobro does not have and has never had an office or other place of business anywhere in the United States of America.

5. Lobro does not have and has never had any employees in the United States.

6. Lobro does not and has never owned, possessed, used or had an interest in any real property in the United States, nor does it have any other assets of any kind there.

7. Lobro does not have and has never transacted any business, nor contracted to supply or perform any character of work or services, anywhere in the United States.

8. Lobro has never contracted to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the United States.

9. Lobro is completely independent from and has absolutely no control over any of the activities of Bayerische Motoren Werke AG ("BMW") or any of the other defendants in this action; neither BMW nor any of the other defendants perform any activities on behalf of Lobro or act as agents for Lobro.

10. Lobro manufactures all of its products at its plants located at Offenbach am Main, Federal Republic of Germany. Lobro's principal products are constant velocity joints for use in automobiles with independent suspension.

11. Lobro sells virtually all of its products directly to automobile manufacturers located in the Federal Republic of Germany or elsewhere in Europe, including BMW. Lobro does not and has never sold its products to any automobile manufacturers located in the United States.

12. All of Lobro's sales to BMW take place in the Federal Republic of Germany and are final. Lobro relinquishes title and all control of its products when it delivers those products to BMW. Such sales are governed by the laws of Germany.

13. Lobro has no control over the method of installation of its products into automobiles by BMW or any other manufacturers or

over the selection of those types or models of automobiles into which its products are installed. Lobro has no control over the sales, distribution or exportation from the Federal Republic of Germany of automobiles into which its products are installed, nor over the subsequent servicing of such automobiles.

14. Lobro's constant velocity joints are sold to BMW and other European automobile manufacturers at prices ranging from approximately DM 56 to DM 72 (roughly $33 - $42.50 at an exchange rate of 1.7 DM per Dollar) and thus represent a minor fraction (well under 1%) of the selling price of a BMW automobile.

15. I am unable to quantify exactly the amount of revenue Lobro derives from sales of its products to BMW and other European manufacturers which are incorporated in automobiles which such manufacturers eventually might export to the United States. However, based on information obtained from automobile manufacturers as to the approximate percentage of their production which each exports to the United States, I would estimate that Lobro's total annual revenue from such sales would not exceed DM 24 million (roughly $14 million). That would represent less than 10% of Lobro's annual sales of approximately DM 300 million. I am unable to estimate the amount of revenue which Lobro possibly could be considered to derive indirectly as the result of the eventual use in either Maryland or the District of Columbia of BMW or other automobiles containing its products, but it surely would be a small amount.

16. Lobro employs no salesmen or sales agents anywhere in the United States and does not actively solicit any business there. It does receive orders on an irregular basis from certain independent distributors of automobile parts located in the United States. All sales made in response to such orders, are made FOB German ports, with title passing to the purchaser in Germany. To the best of my knowledge, no such shipments are made to purchasers located in either Maryland or the District of Columbia. Lobro has no information as to the subsequent distribution of its products by such purchasers, and I do not know whether any of these products eventually find their way into either Maryland or the District of Columbia. The total volume of Lobro's export sales to United States purchasers in any year would not exceed DM 5 million, or less than 2% of Lobro's total sales.

17. Lobro has never been a party in any administrative or judicial proceeding in the United States. While I am aware that a limited percentage of our products eventually may find their way to the United States, as indicated above, Lobro carries on no activity whatsoever there and, to the best of my knowledge, it does not avail itself of any of the privileges or benefits of United States law. I quite frankly had never expected that Lobro, which conducts all of its business and makes all of its sales in Germany, could be called into court in the United States.

/s/ HERMANN MARTEN
Hermann Marten

Certificate Of Service

I hereby certify that a copy of the foregoing Joint Motion of Respondents was mailed postage prepaid this 16th day of July, 1981 to the Honorable June L. Green, Judge, United States District Court for the District of Columbia, Washington, D.C., David N. Webster, Esquire, Paul Martin Wolff, Esquire, Kevin T. Baine, Esquire, Williams and Connolly, 839 17th Street, N.W., Hill Building, Washington, D.C. 20006.

/s/ LEONARD L. LIPSHULTZ
Leonard L. Lipshultz